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September 20, 2017

Mr. Edward Gresser  
Chair  
Trade Policy Staff Committee  
Office of the U.S. Trade Representative  
600 17th Street NW  
Washington, DC 20510

Re: Request for Comments on China's Compliance with its World Trade Organization  
Commitments (USTR-2017-0011)

Dear Mr. Gresser:

The National Association of Manufacturers (NAM) welcomes the opportunity to provide comments to the U.S. government on China's compliance with its World Trade Organization (WTO) commitments in accordance with your [Federal Register notice](#) (82 Fed. Reg. 36071) requesting comments.

The NAM is the largest manufacturing association in the United States, representing more than 14,000 businesses of all sizes in every industrial sector and in all 50 states. More than 90 percent of NAM members are small and medium sized companies. Manufacturing employs more than 12 million women and men across the country, accounting for two-thirds of private sector research and development and contributing over \$2.17 trillion to the U.S. economy annually. Many of those manufacturing companies do business internationally, exporting millions of dollars' worth of products overseas, including to China.

The NAM welcomes this opportunity to build on comments submitted to the U.S. Department of Commerce and Office of the U.S. Trade Representative earlier this year to highlight key issues related to the business environment in China and Chinese government policies and actions that impact manufacturers in the United States. Although the U.S.-China trade and investment relationship has grown considerably, reaching nearly \$540 billion in manufactured goods traded and nearly \$45 billion in accumulated bilateral investment in 2016, manufacturers in the United States face considerable trade-distorting barriers in China that limit market access and tilt the playing field against foreign companies.

This submission aims to highlight a range of current and ongoing issues that manufacturers in the United States face in China, framed in the context of whether China is meeting the commitments that it made when it joined the WTO in 2001.

## Import Regulation

China implemented the initial tariff commitments it made during WTO accession negotiations during its WTO schedule (2002 to 2010), reducing tariffs on a broad range of manufacturing products. This process, however, did not eliminate all of China's high tariff rates in key manufacturing sectors. For example, the import tariff for finished automobiles remains high at 25 percent.

China has participated in negotiations on a number of WTO agreements designed to reduce tariffs in targeted sectors, including the expanded Information Technology Agreement (ITA) and the Environmental Goods Agreement (EGA). On the ITA, China has had challenges in implementing its commitments under the expanded ITA, as it was delayed in implementing its initial round of tariff reductions. In EGA negotiations, China was an important but challenging negotiating partner through the end of the previous administration. From the perspective of NAM members, it is important that the administration engage with, and look to use, negotiating mechanisms such as the EGA talks to promote the elimination of Chinese tariffs on high-end information technology and environmental goods and technologies.

Additionally, manufacturers in the United States continue to be concerned about issues related to customs and trade facilitation. China ratified the WTO's Trade Facilitation Agreement (TFA) in September 2015. China has already notified its Schedule A commitments (which went into effect in February 2017 when the TFA went into effect) and its Schedule B commitments (which go into effect by February 2020). While its Schedule A commitments included a number of critical areas impacting manufacturers in the United States, several important areas, including implementing a "single window" system for customs clearance, publication of average customs release times, or customs cooperation, were included in Schedule B, meaning they have yet to be implemented. The NAM encourages China to implement the full scope of the TFA as quickly as possible, and to make sure that it implements these commitments fully to address manufacturers' concerns.

Manufacturers in the United States also continue to face inconsistencies in customs-related regulations and enforcement. This includes not only multiple and non-coherent regulations from different Chinese agencies that impact a variety of types of goods moving through supply chains, but also different customs clearance proceedings in China between different ports, different agencies and even different customs agents as they seek to get products cleared, including customs classification, customs valuation procedures and clearance requirements.

This lack of uniformity and predictability creates unnecessary challenges for U.S. and other foreign companies seeking to export their goods to China. For example, companies with China-based investments can apply for and receive an import duty exemption if their investment falls under the "encouraged" category of the Catalogue Guiding Foreign Investment. Those companies, however, report that government agencies do not permit companies to use the duty exemption consistently, meaning that different batches of equipment, even coming into the same port, may be treated differently.

Additionally, China's current import clearance regime unnecessarily complicates trade and restricts low-value shipments (including shipments of manufactured goods sent through e-commerce channels) from benefitting from expedited shipments treatment, as envisioned in the TFA. Although China's complex import clearance procedures can clear products through one of three channels (including an e-commerce category), burdensome requirements to utilize the e-commerce channel prevent many products from benefitting from this option. Manufacturers

would benefit from efforts to streamline requirements, simplify documentation, enhance clearance times and facilitate shipments under the normal import clearance channel. Additionally, the Chinese government should expand on past efforts by China Customs to eliminate or reduce fees and ensure that other inspection agencies should reduce user fees that impact manufacturers' ability to export to China.

Manufacturers also track other import regulations and import bans that raise challenges for manufacturers in the United States. For example, the Ministry of Environmental Protection (MEP) in July 2017 notified the WTO of plans to ban the import of 24 types of materials, including scrap paper and plastic, by end of 2017, and subsequently released an implementation plan for "solid waste" import management and a set of prohibitive standards (not all of which were properly notified to the WTO). That ban, which appears contrary to WTO rules unless China seeks an exception for actions to protect the environment, could have a significant and negative impact on the U.S. economy, with a direct impact on the economically significant U.S. recycling industry, including companies that recycle paper, plastic and metals. Manufacturers in the United States are seeking clarifications, including clarity on scope and timing, revisions to proposed standards to align with international norms and a five-year delay in implementation of the rules to allow a longer time period for companies in both China and the United States to adapt and comply with new rules and to develop alternative, sustainable solutions.

China also continues to maintain other long-standing import restrictions, such as a ban on the importation of remanufactured products and remanufactured process units into China, which undermine both American manufacturing and hamper the development of industries in China ranging from mining and agriculture to transportation and communications, because Chinese firms cannot obtain low-cost, high-quality remanufactured products produced outside of China.

## **Export Regulation**

The NAM has long supported the elimination of market-distorting policies, subsidies and trade practices that affect Chinese exports, and the active use of international dispute settlement, bilateral agreements, and the application of trade laws and negotiated remedies to address these issues wherever they arise, including in China. In recent years, the NAM's attention has included issues related to excess capacity, or overcapacity, in China, which have had a significant negative impact on the global market.

Overcapacity in China is affecting manufacturers in the United States in a range of industries, including steel, aluminum, metal products, chemicals, fertilizer, concrete, agricultural processing and semiconductors, as it is actively contributing to a glut in global capacity problems that challenges economies around the world. While China has announced a mix of domestic policies to address overcapacity, more action is needed. The United States is discussing these issues with China and other partners in a variety of other forums, including multilateral channels like the Organization for Economic Cooperation and Development (OECD) and G20 and bilateral dialogues such as the Comprehensive Economic Dialogue (CED). Solving these issues, however, will require the full toolkit, including cooperative approaches that result in concrete outcomes at multilateral forums, bilateral commitments between the United States and China, and WTO-approved enforcement-based approaches to address unfair trade distortions, such as through full U.S. enforcement of trade remedy rules. The U.S. government should work with China to tackle the root of this problem by ensuring that China comprehensively revises existing industrial policies that encourage overcapacity in various sectors and avoids new policies that foster non-market based overcapacity in other sectors. China should also move toward market-

based approaches to credit and competition that curtail excess capacity by shutting down insolvent companies.

More broadly, Chinese government agencies continue to use a variety of export policies, particularly export restraints and export subsidies, to promote or restrict the export of priority products and sectors. Such policies have been particularly prominent in various metals and raw material industries, including several key industries where China serves as a leading global source. These actions raise the costs for foreign downstream producers in a variety of manufacturing industries. The United States has successfully used WTO channels in the past to push back on these policies, winning a 2013 case against Chinese export quotas and duties for raw materials such as bauxite, manganese, and zinc and a 2014 case against Chinese export restraints used on rare earths metals. The United States scored a major victory on one set of subsidies in April 2016 when China, under pressure from a U.S.-filed WTO case filed against more than 175 Chinese government measures that provided subsidies to Chinese companies, agreed to dismantle those programs.

In addition, the United States has a set of outstanding cases against China on export promotion policies, including cases filed in July 2016 against Chinese export duties on key raw materials such as antimony, copper and tin and in January 2017, against subsidies provided to producers of primary aluminum. The United States' aggressive WTO enforcement efforts, however, must continue, as China continues to use export restraints in key sectors in violation of WTO rules, particularly its commitment not to impose duties on products not listed in Annex III of their accession protocol.

## **Internal Policies Impacting Trade**

### **Localization Policies**

When China joined the WTO, China agreed to its core principles to provide most-favored nation (MFN) status and national treatment to foreign products, thus requiring China to provide imported products with no less favorable treatment to that that provided to domestic products. While China took steps to phase out many of the policies that explicitly discriminated against imported products, recent years have seen a resurgence of discriminatory policies, particularly policies that have a differential impact on products and technologies produced by domestic and foreign companies, even if they do not explicitly treat domestic and foreign companies differently. These policies are often as problematic for foreign companies as explicit discrimination, and should be eliminated.

Prime examples of these problematic policies are those that require localization of production or technology, as these policies have a tangible negative impact on foreign companies seeking to do business in the market. Such barriers include policies mandating local testing and certification requirements for products in the ICT and medical sectors and policies requiring companies to store China-generated data on local services and prohibiting its transfer overseas. These policies create various problems for global manufacturers, large and small, as they tilt the playing field in favor of local competitors, thus harming the competitiveness of manufacturers here in the United States and their ability to make business and investment decisions based on how best to build supply chains and serve customers.

Examples of policies with localization elements include:

- Made in China 2025: In May 2015, China launched its “Made in China 2025,” an ambitious ten-year plan designed to upgrade China’s manufacturing economy. The plan sets specific targets for domestic manufacturing (40 percent domestic content of core components and materials by 2020 and 70 percent by 2025), focusing on ten priority sectors such as information technology, new-energy vehicles, agricultural equipment and robotics. While the plan’s broad objective of promoting smart manufacturing policies in China is common to many countries, the specific implementation and localization targets of the plan raise significant concerns for manufacturers in the United States. In particular, the plan’s focus on building globally competitive Chinese companies through specific government policies and financial support raise concerns that the plan’s effect will be to benefit Chinese manufacturers at over foreign ones, raising significant questions about the consistency of policies with China’s WTO commitments.
- Cybersecurity-related laws and measures that encourage transfer of technology and restrict cross-border data flows: China has taken steps in recent years to tighten its cybersecurity environment in ways that create as trade barriers, blocking market access and forcing companies to use local technologies, promoting inappropriate technology transfer and restricting cross-border data flows. A series of Chinese regulations in recent years have mandate the use of “secure and controllable” technology and software, a term that requires foreign products to disclose source code and other sensitive and proprietary information to the Chinese government. Such policies include the Cybersecurity Law, National Security Law, Counterterrorism Law, August 2016 opinions on strengthening the standardization of national cybersecurity and sector-specific provisions in banking and insurance. The Cybersecurity Law also requires foreign companies to store data collected in China on local servers and prevents them from transmitting such data outside of China. This has spurred other proposed or widely discussed measures to extend these requirements through a broad definition of critical information infrastructure that would include cloud computing, big data and other areas. Such technologies and the data flows they depend on are critical in the deployment of machine-to-machine and Internet of Things technologies that are increasingly used by manufacturers to improve their products and manage their operations.

These provisions pressure foreign companies into transferring key technologies and data to China, including critical source code, and limit the ability of manufacturers to use increasingly important digital solutions such as cloud computing and big data analytics in China. Such policies effectively serve to protect Chinese companies at the expense of manufacturers here in the United States, blocking trade in strategic and innovation-intensive sectors such as information technology and undermining hard-won technology and productivity gains that have made the United States one of the most competitive producers in the world. As manufacturers increasingly rely on digital technologies and connectivity to operate, maintain and service their products globally, China’s expanding restrictions on the outward flow of data represents a significant trade barrier that will negatively impact the ability of companies fully employ digital technologies to compete in that market while forcing transfer of technologies and operations to China in order to remain competitive.

- Data flow restrictions/Internet controls: China’s Cybersecurity Law also requires many foreign companies to store data collected in China on local servers. Other proposed or widely discussed measures, such as possible rules related to Internet-based mapping

applications and draft cybersecurity standards released by the National Information Security Standardization Technical Committee (TC 260), appear to build on these requirements. China's Internet controls are also increasingly making it difficult for companies to operate in China. The expansion of data restrictions and limitations on the use of the Internet threaten the growth of cloud computing-based business models, such as evolving machine-to-machine (M2M) applications, that many manufacturers are increasingly using throughout their operations. Moreover, these restrictions are having a direct operational impact on manufacturers in the United States, due both to the increased costs of building and maintaining China-based servers and to their inability to share even data in areas such as human resources and R&D projects across borders. Such localization barriers are particularly harmful for small and medium-sized manufacturers whose exports rely on Internet storefronts and other e-commerce channels to reach consumers in China.

China also maintains a variety of more product and sector-specific policies that have a disparate impact on imported and domestic products. Examples include expedited product approvals for innovative medical device products (which generally favor domestic products versus imported products or even products developed locally by foreign companies), mandates for local clinical trials for Class III medical devices (which are mostly imported), persistence of provincial and local "indigenous innovation" product catalogues despite central government commitments to eliminate them and implementation of China's revised Food Safety Law with stricter standards for imported food and agriculture products.

### Price Controls

In its WTO accession agreement, China agreed that it would not use price controls to restrict the level of imports of goods or services, and stated that it would try to reduce the number of products and services on this list and avoid imposing price controls on products or services except for extraordinary circumstances.

While China has slowly taken steps to phase out price controls in many areas and has made past commitments to move towards market-based prices, China maintains controls in some areas, particularly in the health sector. One troubling example is impacting the medical device sector. On September 7, the National Health and Family Planning Commission (NHFPC) released a notice setting the process for national price negotiations for four types of high-end medical device products: drug coronary stent systems, artificial hip prosthesis, implantable cardioverter defibrillator series (ICD) and cardiac resynchronization therapy (CRT). The notice requires impacted manufacturers to submit detailed information to NHFPC on a very tight deadline (September 18). If they cannot provide that information on such a tight turnaround, they could be blocked from procurement in Chinese public and military hospitals. This notice raises major questions about transparency, process and fairness, that are characteristic of Chinese regulatory activity. It also fails to provide detailed information on critical details, such as evaluation criteria, price negotiating processes, applicability to provincial hospitals and the timeframe under which prices would be negotiated. The lack of transparency surrounding this notice, and the short timeframe to implementation, both raise questions about whether it meets China's commitments under the WTO's Technical Barriers to Trade (TBT) Agreement. Suspending implementation of this notice and instituting a 30-day notice and comment period to engage with all stakeholders would be a first step to address these concerns while allowing time to resolve issues with the notice.

### Standards, Technical Regulations and Conformity Assessment Procedures

Manufacturers in the United States continue to experience a variety of challenges related to standards and technical regulations in China, ranging from inadequate channels for participation in standard-setting processes, treatment of intellectual property in standards-setting and China-specific regulatory and technical requirements that do not harmonize with international standards. All of these regulations and requirements can add significantly to the cost of manufacturing products for export to China, and limit the ability of U.S.-manufactured products to compete fairly in China.

In September 2017, China's National People's Congress (NPC) released an updated draft of the Standardization Law for public comments. The latest draft provides some greater clarity on a few areas raised by manufacturers in the United States, including the categories of standards, which social organizations can develop association standards, and penalties for non-compliance with national standards. Manufacturers remain concerned, however, about various provisions in the law. Despite repeated advocacy, this latest draft continues to make no reference to China's WTO TBT obligations, despite the fact that that agreement should reasonably serve as the basis for any signatory's legal and policy frameworks of standardization to ensure harmonization with international practices. Manufacturers are also concerned with self-declaration requirements for enterprise standards that could endanger intellectual property (IP) rights, as they could require companies to disclose proprietary information and antitrust implications of treating enterprise standards the same as collaboratively-developed standards.

Manufacturers are also closely watching Chinese actions related to patent and royalty issues in standard-setting processes, as this has been an active area of discussion within the scope of both standards regulation and competition law. The *Interim Regulatory Measures on National Standards Involving Patents* (released in 2013 and taking effect in 2014) removed some problematic language in earlier drafts related to the handling of intellectual property in standard-setting processes, but issues with patents, standards and royalties continue to be reflected in various draft regulations and documents related to competition. (For more, see "Other IP-Related Legal and Regulatory Areas of Concern.")

Testing and certification issues are also a concern for many manufacturers in the United States, particularly SMMs. The China Compulsory Certification (CCC) system is required for a wide range of manufactured products that are produced or imported into China. Yet for large and small manufacturers alike, the CCC system can be challenging and costly. Companies can experience long processing times and delays while going through the CCC certification process, exacerbated by the small number of choices that companies have in testing labs and designated certification bodies (DCBs). Allowing greater participation by foreign entities would alleviate this situation, facilitating greater market access in line with the spirit of China's WTO pledges. In addition, many companies face inconsistent interpretations of CCC rules by different officials. In particular, officials from the China National Certification Administration and local officials from China Customs and the Administration of Quality Supervision, Inspection and Quarantine in different ports may provide contradictory information about whether a given product must be CCC-certified. Thus, one shipment may clear Customs easily, while the next shipment is held up. This creates major challenges for manufacturers from the United States exporting products to China. Harmonizing these interpretations will reduce time spent on administrative and testing procedures, and ultimately speed the time it takes to bring a product to market.

Other specific Chinese standards and technical regulations also raise questions and concerns that are relevant for the WTO context. For example, China revised in January 2016 its *Administrative Rules for Control and Use of Hazardous Substances in Electric and Electronic Products*, which updated China's restrictions on hazardous substances. (As China's regime is known as "China RoHS," these revisions are known as "China RoHS 2.") That revision expanded both the set of restricted chemicals as well as the scope of products subject to RoHS restrictions. China released a detailed frequently-asked questions (FAQ) document in May 2016 prior to the July 2016 implementation date, but only released a draft list of products to be covered (such as refrigerators, mobile communication devices, and printers) in June 2017. The move to China RoHS 2 has important implications for manufacturers in the United States, as they invoke new labeling and certification procedures for many products.

### State-Owned Enterprises

During China's WTO accession, China made a number of commitments related to the activities of state-owned and state-invested enterprises (SOEs and SIEs), including agreeing that those firms would make purchases and sales based solely on commercial considerations and not be influenced by the government. Despite that commitment, the Chinese government has continued to play a strong hand in SOE and SIE management and decision-making, and to pressure these firms to act in ways to support government priorities. Such actions have come not only through various rules and plans (such as the 2006 State Council Guiding Opinions on Promoting the Adjustment of State-Owned Assets and the Restructuring of State-Owned Enterprises), but also conscripting SOEs to support and carry out government imperatives such as investing to boost flagging economic growth (June 2016).

Perhaps the most telltale sign of these continued issues was China's SOE reform plan, released in November 2015, which sidestepped some of the most badly needed structural reforms such as a clear commitment to ensure SOEs operate on market terms, plans or criteria to allow greater privatization for SOEs, or strategies to allow failing SOEs to go bankrupt. Instead, the plan calls for steps to "unswervingly strive to make SOEs strong, superior and large" and instead focuses on small changes such as promoting mixed-ownership structures, addressing corruption and reform to executive board operations. Recent activities, such as June 2017 measures from the State-Owned Assets Supervision and Administration Commission, reinforce that this plan remains the guiding approach, with a focus only on how to categorize SOEs (as "for profit" or "social welfare and public service" forms) and mixed-ownership models. Manufacturers remain concerned by this approach, which does little to move towards market reform, and urge further attention by the U.S. government.

### **Intellectual Property Rights**

China has recognized the vital role that innovation and IP protection play in economic development and encouraging more foreign investment, with strong language on innovation in key high-level documents such as the December 2014 National IP Rights Strategy (2014-2020), the 2015 13<sup>th</sup> Five-Year Plan (2015-2020) and the 2015 State Council *Opinions on Accelerating the Construction of a Strong IP Country under a New Situation*. China's position as the world's top patent office in terms of number of patent applications and patent grants also reflects growing interest in intellectual property. Yet while China's increased recognition of the value of innovation has fostered progress on IP issues in recent bilateral dialogues, the United States must continue to urge China to do more to create a fair innovation environment. Such an environment would allow foreign companies to develop, register and protect IP in China on a



non-discriminatory basis, while not providing unfair advantages to firms that develop IP in China.

IP protection in China is a priority for manufacturers of all sizes. Among the primary issues that manufacturers in the United States face are troubling IP-related policy developments and inadequate IP enforcement. These problems are particularly acute for small and medium-sized manufacturers that lack the resources to track down and prosecute counterfeiters and pirates and often do not have in-house IP experts or investigators.

### Core Legal Framework

China's overall legal framework for IP protection and enforcement is fairly robust, and comprehensively covers core areas of IP, such as patents, trademarks, copyrights and trade secrets. Yet China's core IP laws and regulations still contain key weaknesses, and the spread of IP into other areas of law (such as competition and standards) have raised critical questions for manufacturers in a variety of areas.

Trade secrets reflects one area of weakness in China's laws and regulations. Trade secrets remain under the Anti-Unfair Competition Law (AUCL), last revised in 1993. In February 2016, after years of efforts by the U.S. government and others to encourage China to draft an updated, standalone trade secrets law, the State Administration of Industry and Commerce (SAIC) finally decided to act, releasing a draft of the AUCL for public comment. Those revisions have continued to evolve, with the NPC releasing the latest draft for public comment in September 2017.

The latest draft of the AUCL proposes some positive changes, including increasing administrative fines for trade secret infringement and expanding the scope of trade secret protection to include behaviors by current and former employees, and removes some earlier problematic language on issues such as abuse of a company's dominant market position. Yet manufacturers continue to have questions about various provisions and whether the draft will address effectively problematic areas of trade secrets enforcement, such as high evidentiary burdens, low damage awards and limited use of judicial tools such as preliminary injunctions. The United States should continue to engage China to improve effective protection for trade secrets through multiple means, including improving judicial practices and advancing legal reforms that include not only the AUCL but also other laws and regulations that also impact trade secrets enforcement. Additionally, China must take additional steps to address concerns about regulator requests for trade secrets and confidential business information, including limiting requests to legitimate regulatory purposes and providing clear protection for any such data required by regulators.

The most recent version of the Trademark Law and its implementing regulations have also raised concerns for companies, as they increase the risk that brand owners will be held hostage to pirates registering marks in bad faith or to other parties infringing upon their legitimate trademarks. For example, if a trademark owner opposes a third-party application to register a mark and loses, they cannot appeal that decision under the new Trademark Law, and the registration is granted. The trademark owner must then go through another timely and costly proceeding to seek invalidation of that mark, and if the registered mark is identical to the trademark owner's prior yet unregistered mark, the owner must either halt its use of the mark or risk an enforcement action. Other trademark issues facing manufacturers remain unaddressed by the latest revised law, including persistent issues of trademark squatting in China. This is a longstanding challenge for manufacturers, particularly SMMs, exacerbated by China's "first to

file” system (which prevents consideration of prior unregistered use of a trademark) and high standards for well-known trademarks (requiring the mark to be well-known to the average consumer across China) that often serves as a *de facto* bar for many foreign companies.

Manufacturers in the United States are also closely watching the ongoing revisions to other core IP laws, such as the Patent Law and the Copyright Law, which may impact the ability of manufacturers to register and protect their IP in China. With the Patent Law, for example, a number of outstanding questions remain related to administrative patent enforcement authority, the role of local patent authorities in enforcement, and vague language related to IP abuse that could pose challenges for companies to exercise their patent rights.

Similarly, manufacturers are monitoring implementation of Chinese commitments made through bilateral dialogue on trademark-related areas such as geographical indications (GIs), including mutual pledges on the importance of relationships between GIs and trademarks, recognition that generic terms are not eligible for GI protection and the importance of GI opposition and cancellation proceedings. Monitoring of the latter is particularly important given European Union efforts to negotiate a new trade agreement with China.

#### Other IP-Related Legal and Regulatory Areas of Concern

Manufacturers are also closely monitoring China’s increasing incorporation of IP rules into other areas of regulation, sometimes in ways that raise significant concerns for manufacturers and questions about their consistency with WTO obligations. Such areas include standards, competition and industry development.

One key example is China’s drive to promote economic development through “indigenous innovation,” which is often interpreted as innovation by Chinese firms in China, at the expense of foreign companies, products and technologies. The United States and other national governments have pushed back repeatedly to halt or force revisions to discriminatory innovation policies, including incentives provided under China’s Strategic and Emerging Industries (SEIs) program and efforts to create a national catalogue of indigenous innovation products that would be eligible for various government incentives. Despite these efforts, manufacturers in the United States continue to face problematic indigenous innovation policies, including language in policies discussed in the “Localization Policies” section such as “Made in China 2025,” the Cybersecurity Law, and others, and provincial and local catalogues of indigenous innovation products that largely exclude foreign products.

Additionally, China has released a flurry of recent draft regulations, including draft guidelines from the State Council Anti-Monopoly Commission, National Development and Reform Commission and State Administration of Industry and Commerce, that raise concerns about how Chinese regulators may treat the legitimate exercise of IP in relation to competition. Manufacturers in the United States are concerned with whether China will ensure that competition enforcement will be “fair, objective, transparent and non-discriminatory,” and that regulators do not interpret inappropriately the existence of IP as market dominance that is subject to competition to proceedings.

The NAM also encourages U.S. government officials to consider other priority issues raised in the [NAM’s Special 301 submission](#) for their WTO relevance, including IP licensing, China’s draft “service invention” regulations, issues related to patent quality and acceptance of supplemental data for pharmaceutical patents. The NAM additionally notes that while China’s current regulatory data protection system is ineffective and has certain limitations, the China Food and

Drug Administration (CFDA)'s May 2017 draft *Policies Related to Encouraging Innovator Rights and Interests in Drug and Medical Device Innovation Protection* (Circular 55) proposes a new structure for regulatory data exclusivity that could address certain issues. Manufacturers in the health industry are watching closely for additional details from CFDA.

### IP Enforcement

Counterfeiting and piracy remain rampant in China, which continues to be the leading source of counterfeit and pirated goods traded around the world. In 2014, 87 percent of the \$1.35 billion in counterfeit goods seized at U.S. borders were from China (52 percent) or Hong Kong (35 percent).<sup>1</sup> Moreover, many U.S. manufacturers report challenges with Chinese suppliers or companies copying their products and designs to manufacture and sell virtually identical versions of their products in China and third-party markets under their own brand names.

IP theft in China is a serious concern for manufacturers of all sizes, but can pose an insurmountable challenge for small businesses. These firms often do not have in-house IP experts or investigators. They do not have the resources to track down and prosecute counterfeiters and pirates, and are particularly reliant on government actions to stop international counterfeiting and piracy and trade in fakes. Many of these members often are reluctant to or decide not to export to China for fear of losing their IP, thus cutting them out of one of the world's largest markets.

In China, these problems are fueled by structural policy barriers, including insufficient coordination among different agencies and levels of government, insufficient political will by officials to tackle the problem and inadequate resources and capacity to address IP infringement. Specific value thresholds prevent criminal prosecution for IP infringement in most cases and low administrative fines and civil damages provide little deterrence as counterfeiters and pirates often see fines merely as a cost of doing business. Other specific legal changes that could tackle counterfeiting, such as broadening the definition of "bad faith" trademark filings to include efforts to register a trademark knowingly being used by a competitor, remain unaddressed.

Fighting counterfeiting and piracy in China must not only tackle traditional physical counterfeiting markets and cross-border transit routes, but all means by which counterfeit products are circulating, including online auction sites in China such as Alibaba and Taobao that have pledged actions but have yet to address concerns for many brand-owners facing rampant counterfeiting via their platforms. Other means that must be tackled include transit of counterfeit products via inadequately policed free trade zones in markets around the world, and illegal use by overseas rogue sites and remote sellers of international mail services and airmail such as the China-based express mail service of the China Post.

Companies also face challenges with patent and trade secret enforcement. China's specialized IP courts were created to facilitate better management of complex IP matters, including providing consistent, streamlined opportunities for IP litigants, but remain limited in terms of their scope and jurisdiction. Through both legal reforms (see "Core IP Laws and Regulations") and changes to practice, China must take steps to boost patent and trade secret enforcement, addressing evidentiary burdens and other practical barriers, structural challenges that limit damages and remedies and boost access to judicial tools such as preliminary injunctions. A

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<sup>1</sup> Office of Trade, U.S. Customs and Border Protection, "[Intellectual Property Rights: Fiscal Year 2015 Seizure Statistics](#)," April 2016.

strong enforcement system is critical to deterring trade secret misappropriation and demonstrating to innovators that China takes protecting their intellectual property seriously.

## **Rule of Law Issues**

Despite Chinese commitments during its accession to a range of reforms related to rule of law, including regulatory transparency and consistent implementation of laws and regulations, China continues to struggle with many of these areas in ways that have a significant negative impact on the ability of manufacturers in the United States to navigate China's regulatory framework.

### Transparency

Global manufacturers seeking to operate in markets around the world depend on regulatory transparency: their ability to get information about laws and regulations they must follow, to provide feedback to government rulemaking processes and to ensure that government decisions are made fairly and based on consistent criteria. China made general commitments on these issues as part of its accession protocol, but is also bound by transparency commitments under the WTO TBT Agreement to notify all laws, regulations, or other measures related to trade in goods or services no later than 90 days after they are implemented or enforced.

Despite China's WTO commitments, regulatory transparency remains a problem. Manufacturers continue to flag regulations that are not notified for the requisite period, as well as cases in which Chinese government agencies implement new or revised laws and regulations with a very short lead time. Such changes cause significant hardship to manufacturers in the United States, particularly small- and medium-sized manufacturers (SMMs), seeking to comply with these rules or provide useful feedback to Chinese government agencies.

### Regulatory approvals

Manufacturers in the United States also experience challenges related to regulatory approvals, in which companies are not able to get products approved due to protectionism as opposed to sound science or risk analysis. Two examples of this occur in agricultural biotechnology and meat products:

- Agricultural biotechnology product approvals: Despite the February 2016 approval of three products by the Chinese Ministry of Agriculture (MOA), and commitments made to adopt transparent process for these approvals as part of the "100-day plan" earlier this year, NAM members continue to report delays in approvals of agricultural biotechnology products. Delaying or restricting product approvals to prevent foreign players from entering the market raises serious WTO questions. To address these concerns, China must work to review and approve those products already delayed, but also create and consistently implement a timely, transparent and predictable biotech regulatory approval process in line with its WTO obligations.
- Market access issues for meat products: Despite past commitments in past Joint Commission on Commerce and Trade meetings, and commitments to address this issue as part of the "100-day plan" earlier this year, NAM members report that they face challenges in consistently getting sufficient amounts of meat products into China. Past issues have included continued bovine spongiform encephalopathy-related (BSE) bans on beef product imports, unnecessary restrictions related to veterinary drugs commonly

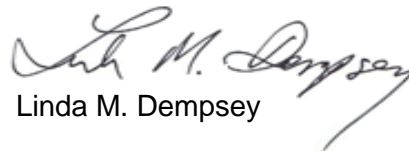
used in pork products in U.S. and other pork-producing countries, and bans on poultry products from certain U.S. states that do not adhere to international best practices.

## Conclusion

The NAM appreciates the persistent efforts of the members of the Trade Policy Subcommittee and their respective government agencies to assess China's track record of implementing its WTO commitments, and to use all available bilateral and multilateral channels to address them.

Please do not hesitate to contact either me or our lead contact on China issues, Ryan Ong ([rong@nam.org](mailto:rong@nam.org)) as the NAM can help further on these issues. I am attaching additional NAM materials that provide greater detail on these and other China issues.

Respectfully,



Linda M. Dempsey

## Attachments:

- China Section, NAM's 2017 Submission to USTR's Special 301 Process
- NAM's 2016 Submission for USTR's National Trade Estimate Report

## China Section, National Association of Manufacturers' 2017 Submission to USTR's Special 301 Process<sup>2</sup>

China's increased recognition of the value of innovation and intellectual property, as reflected in high-level documents such as the [13<sup>th</sup> Five-Year Plan](#), has fostered more attention on IP at home and progress on IP issues in bilateral dialogues such as the 2016 Strategic and Economic Dialogue (S&ED) and Joint Commission on Commerce and Trade (JCCT). In 2016, for example, that included commitments to eliminate persistent indigenous innovation requirements in government procurement policy, address security-related IP issues in information technology policies, and cooperation on technology licensing, and addressing IP infringement over e-commerce platforms.<sup>3</sup> The NAM supports these outcomes and USTR efforts to ensure robust implementation of Chinese commitments related to intellectual property.

Yet there is a clear reason why China has remained on the Priority Watch List of the Special 301 report year after year: manufacturers in the United States continue to face significant IP-related challenges that stem from Chinese government policies and practices. The United States must continue to urge China to do more to create a fair innovation environment. Such an environment would allow foreign companies to develop, register, and protect IP in China on a non-discriminatory basis, while not providing unfair advantages to domestic firms or requiring them to localize their R&D or technology in China. Examples of discriminatory or otherwise harmful IP policies include China's continued position as a hub for global counterfeiting and piracy, lack of effective trade secret protection and protection for confidential business information, continued weaknesses and implementation questions on core IP laws, and indigenous innovation and industry development policies that protect domestic IP-intensive industries, and structural barriers that hinder effective enforcement of IP rights.

**Counterfeiting and piracy** remain rampant in China, which continues to be the leading source of counterfeit and pirated goods traded around the world. In 2014, 87 percent of the \$1.35 billion in counterfeit goods seized at U.S. borders were from China (52 percent) or Hong Kong (35 percent).<sup>4</sup> Major categories of counterfeit products included medicines, consumer electronics, toys, computer accessories and other goods that could pose serious health and safety risks. IP theft in China is a serious concern for manufacturers of all sizes, but can pose an insurmountable challenge for small businesses. These firms often do not have in-house IP experts or investigators. They do not have the resources to track down and prosecute counterfeiters and pirates, and are particularly reliant on government actions to stop international counterfeiting and piracy and trade in fakes.

In China, these problems are fueled by structural policy barriers, including insufficient coordination among different agencies and levels of government, insufficient political will by officials to tackle the problem, and inadequate resources and capacity to address IP infringement. Specific value thresholds prevent criminal prosecution for IP infringement in most

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<sup>2</sup> Full text of NAM submission is available at [http://documents.nam.org/IEA/NAM\\_2017\\_Special\\_301\\_Comments.pdf](http://documents.nam.org/IEA/NAM_2017_Special_301_Comments.pdf).

<sup>3</sup> Office of the U.S. Trade Representative, "[U.S. Fact Sheet for the 27th U.S.-China Joint Commission on Commerce and Trade](#)," November 2016.

<sup>4</sup> Office of Trade, U.S. Customs and Border Protection, "[Intellectual Property Rights: Fiscal Year 2015 Seizure Statistics](#)," April 2016.

cases, and low administrative fines and civil damages provide little deterrence as counterfeiters and pirates often see fines merely as a cost of doing business.

While U.S. federal agencies are taking important and meaningful steps to stop international counterfeiting and piracy, including new tools provided by the Trade Facilitation and Trade Enforcement Act of 2015, those officials face a huge challenge in trying to address counterfeiting and piracy in China. Chinese counterfeiting and piracy have a broad impact here in the United States: exposing U.S. consumers to illegal or even hazardous imported products and putting critical U.S.-developed technologies at risk. For some, that risk is just too high. Smaller manufacturers, in particular, often are reluctant to or decide not to export to China for fear of losing their IP, thus cutting them out of one of the world's largest markets. The United States cannot afford to accept weak IP enforcement in China that prevents small businesses from exporting to one of the world's largest and fastest growing markets.

Fighting counterfeiting and piracy in China must not only tackle traditional physical counterfeiting markets and cross-border transit routes, but all means by which counterfeit products are circulating, including online auction sites in China such as Alibaba and Taobao that have pledged actions but have yet to address concerns for many brand-owners facing rampant counterfeiting via their platforms. Other means that must be tackled include transit of counterfeit products via inadequately policed free trade zones in markets around the world, and illegal use by overseas rogue sites and remote sellers of international mail services and airmail such as the China-based express mail service of the China Post.

**Trade secret theft** also remains a challenge in China, though companies have seen some positive steps, including a handful of trade secrets cases in which courts granted preliminary injunctions. China's new and specialized IP courts were created to facilitate better management of complex IP matters, including providing consistent, streamlined opportunities for IP litigants, but remain limited in terms of their scope and jurisdiction. Current actions, however, are not doing enough to help companies protect critical know-how. China must take steps to boost trade secrets enforcement, addressing evidentiary burdens and other practical barriers such as the difficulty of using judicial tools such as preliminary injunctions that in practice prevent companies from enforcing their trade secrets through China's courts. Additionally, damage awards have not adequately compensated trade secret owners against losses. A strong enforcement system is critical to deterring trade secret misappropriation and demonstrating to innovators that China takes protecting IP seriously.

Previous rounds of the Joint Commission on Commerce and Trade (JCCT) included Chinese commitments on these areas, including revisions to its Anti-Unfair Competition Law, issuance of issue model or guiding court cases, and clarification of rules on preliminary injunctions, evidence preservation orders, and damages.<sup>5</sup> Indeed, China's State Administration of Industry and Commerce (SAIC) in February 2016 released a draft of the AUCL for public comment that included some positive changes, including increasing administrative fines for trade secret infringement and allowing a company bringing a trade secret case to shift the burden of proof to a defendant once they can establish that infringement has probably occurred. Yet the law did not fully address other challenging areas of trade secret protection, including high evidentiary burdens, low damage awards, and limited use of judicial tools such as preliminary injunctions, and is not yet final. The NAM encourages the U.S. government to work with China to meet its

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<sup>5</sup> U.S. Department of Commerce Office of Public Affairs, "[U.S. Fact Sheet: 26th U.S.-China Joint Commission on Commerce and Trade](#)," November 2015; Office of the U.S. Trade Representative, "[U.S. Fact Sheet for the 27th U.S.-China Joint Commission on Commerce and Trade](#)," November 2016.



JCCT commitments related to trade secrets, and to continue encouraging China to move beyond those commitments to consider legal and judicial reforms that extend beyond the confines of the Anti-Unfair Competition Law, which contains only a portion of the relevant legal provisions dealing with trade secrets issues.

The NAM welcomes efforts by China to address foreign company concerns about **indigenous innovation initiatives**, including steps to limit the use of indigenous innovation policies in government procurement, to clarify that foreign companies are eligible to participate in innovation-related government such as its semiconductor development plan. In the run-up to the 2016 JCCT, the State Council issued a formal document requiring local governments and agencies to eliminate provisions linking indigenous innovation to government procurement preferences, reaffirming a commitment made by former president Hu Jintao in 2011 and addressing one area of discriminatory treatment for innovative foreign products.<sup>6</sup> As with the 2011 commitment, full and robust implementation and monitoring will be key to address manufacturer concerns. Despite these developments, NAM members are monitoring closely to ensure that policies at the central and provincial level, such as the Made in China 2025 policy framework, do not unfairly protect domestic business at the expense of innovative foreign manufacturers.

China's patent system also has issues with **patent quality**, due to the lack of substantive examination for utility model and design patents. The quality of these unexamined assets is largely unknown, regularly resulting in the granting of "junk patents" that enjoy a high level of protection but often carry a low level of inventiveness. Though these patents may not have been granted if fully examined, they still carry full patent rights, allowing those who hold them to assert these junk patents against genuine innovators. The vast majority of these unexamined rights are held by Chinese domestic companies and individuals. Since no substantive review of unexamined assets is required prior to their assertion, they can represent a significant business risk to innovation-driven U.S. and Chinese companies. The NAM believes China's patent system should be reformed to address these concerns. Possible reforms could include:

- Requiring the preparation of an evaluation report for utility model patents before issuing the patent;
- Encouraging the preparation of an evaluation report for utility model patents to accompany a cease and desist letter on a utility model patent, or requiring such an evaluation report prior to filing a complaint
- Requiring the patent applicant to pay the fee for a substantive examination, regardless of who requests the examination
- Impose meaningful penalties for companies operating in bad faith by threatening competitors or customers with unexamined or rejected utility model patents.

Manufacturers in the United States are also closely watching the **ongoing revisions to key areas of the IP legal framework**, such as the Patent Law and the Copyright Law, which may impact the ability of manufacturers to register and protect their IP in China. With the Patent Law, for example, a number of outstanding questions remain related to administrative patent enforcement authority, the role of local patent authorities in enforcement, and vague language related to IP abuse that could pose challenges for companies to exercise their patent rights.

Other legal revisions already completed, such as the **Trademark Law** and its implementing regulations, continue to increase the risk that brand owners will be held hostage to pirates

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<sup>6</sup> US-China Business Council, [Update: China's Innovation & Government Procurement Policies](#), May 2015



registering marks in bad faith or to other parties infringing upon their legitimate trademarks. For example, if a trademark owner opposes a third-party application to register a mark and loses, they cannot appeal that decision under the new Trademark Law, and the registration is granted. The trademark owner must then go through another timely and costly proceeding to seek invalidation of that mark, and if the registered mark is identical to the trademark owner's prior yet unregistered mark, the owner must either halt its use of the mark or risk an enforcement action. Other trademark issues facing manufacturers remain unaddressed by the latest revised law, including persistent issues of trademark squatting in China. This is a longstanding challenge for manufacturers, particularly SMMs, exacerbated by China's "first to file" system (which prevents consideration of prior unregistered use of a trademark) and a high standard for well-known trademarks (requiring the mark to be well-known to the average consumer across China) that often serves as a *de facto* bar for many foreign companies.

Manufacturers are also closely monitoring China's increasing incorporation of IP rules into other areas of regulation, sometimes in ways that raise significant concerns for manufacturers and questions about their consistency with WTO obligations. For example, China continues to give special, unwarranted attention to **IP in the context of competition**, with a number of outstanding guidelines designed to regulate "IP abuse," including draft Anti-Monopoly Guidelines on Abuse of IP Rights released by the State Council Anti-Monopoly Commission and the National Development and Reform Commission.<sup>7</sup> These policies raise concerns about how Chinese regulators may treat the legitimate exercise of IP in consideration of competition concerns. These regulations should align with international best practices and with specific Chinese commitments made in bilateral dialogues to ensure that competition enforcement is "fair, objective, transparent, and non-discriminatory." China should explicitly recognize that the existence of IP does not equate to market power. In instances where competitive concerns may genuinely be raised by bad behavior, the appropriate remedy should be to address that behavior, not to curtail IP.

China's **IP-related standard-setting practices** continue to cause significant concern. As part of its National Intellectual Property Strategy, China has focused on improving its standards-related policies. China moved in that direction in 2013 with revised Regulatory Measures on National Standards Involving Patents that removed some problematic language related to the handling of IP in standard-setting processes. Participation in standard-setting activities, however, remains a question for some companies: manufacturers still can only participate in China's standard setting processes by invitation, putting them at a disadvantage relative to their Chinese competitors.<sup>8</sup> These gaps are particularly noticeable in areas of manufacturing such as information technology.

**IP licensing** also remains an issue for many companies, due to challenges they face licensing technology into China even to their own subsidiaries. In a move clearly aimed at encouraging businesses to develop technology locally, China's 2001 Technology Import-Export Administrative Regulations impose greater risks and liabilities on overseas technology licensors than on domestic licensors. For example, unlike a domestic licensor, an overseas licensor is liable for infringing a third party's rights due to the licensee's use of the licensed technology, and also could not own technology improvements developed by the licensee. This puts

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<sup>7</sup> These rules follow similar IP abuse rules already formulated and finalized by the State Administration of Industry and Commerce in April 2015.

<sup>8</sup> This is particularly significant as the draft Rules limit the ways patents that relate to standards can be used, regardless of participating in the relevant standard body. See State Administration of Industry and Commerce of China, [Regulations on the Prohibition of Abuse of Intellectual Property Rights to Eliminate and Restrict Competition](#) (IP Abuse Rules), June 2014.

manufacturers based abroad at a significant competitive disadvantage. China at the 2016 JCCT stated that they are actively researching potential revisions to these regulations to address U.S. concerns, and plans to convene a joint seminar with the United States in the first quarter of 2017. The NAM encourages the U.S. government to hold China to that commitment.

**Protection of sensitive business information** is also a question for many NAM members operating in China. Similarly, companies report instances in which customs officials in **China** press importers of certain chemical formulations to supply proprietary information, including the name and percentage of each specific monomer as a condition of customs clearance.

China continues to draft a new regulation on “**service inventions**” that are created during an inventor’s employment, though there have been no new updates in several months. If passed, the regulation could damage the ability of manufacturers to make commercial choices about how best to exploit IP derived from inventions in China, and increase not only legal and financial risks but the cost of research and development operations in China, making China a less attractive location for manufacturing R&D. Progress was made last year, however, with revisions that mean the regulations would no longer apply to technical secrets.

The United States and China made important commitments at the December 2014 JCCT related to **geographical indications (GIs)**, an important area of IP protected as a trademark broadly around the world, including in the United States. Those pledges covered the importance of relationships between GIs and trademarks, recognition that generic terms are not eligible for GI protection, and the importance of GI opposition and cancellation proceedings, and a commitment to further dialogue on these issues. The United States and China should continue to engage actively on these issues both in bilateral discussions and as the two countries engage with other trading partners.

Finally, patent filers in the pharmaceutical industry continue to face patentability and patent invalidation issues related to ongoing restrictions on submitting **supplemental data**. China’s State Intellectual Property Office does not consistently accept data generated after a patent is filed during patent prosecution to describe inventions or satisfy inventive step requirements. Such a practice deviates from the world’s other busiest patent offices, including patent offices in the United States, Europe, Japan and Korea: meaning that patents accepted in these locations can experience problems in China. China’s State Intellectual Property Office in 2016 issued draft Patent Examination Guidelines that would require examiners to consider post-filing experimental data – a shift that appears intended to implement its December 2013 U.S.-China Joint Commission on Commerce and Trade (JCCT) commitment to allow patent applicants to submit additional data after filing patent applications. The NAM hopes that the final guidelines, when released, reflect this change as well as other feedback received from industry groups.

Linda M. Dempsey

Vice President

International Economic Affairs

October 27, 2016

Mr. Edward Gresser  
Acting Chair, Trade Policy Staff Committee  
Office of the United States Trade Representative  
600 17<sup>th</sup> Street, NW  
Washington, DC 20503

Ref: Docket No.: USTR-2016-0007

Dear Chairman Gresser:

The National Association of Manufacturers (NAM) welcomes this opportunity to provide the following submission for the 2017 *National Trade Estimate Report on Foreign Trade Barriers*. The NAM is the largest manufacturing association in the United States, representing businesses small and large in every industrial sector and in all 50 states. Manufacturing employs more than 12 million women and men across the country, contributing more than \$2.17 trillion to the U.S. economy annually.

With 95 percent of the world's consumers living outside the United States, overseas sales and exports continue to provide an enormous opportunity for manufacturers to create and sustain jobs here at home – and such growth opportunities are perhaps even more critical in this period of global economic challenges. Through overseas sales and exports, manufacturers in the United States are competing to capture a greater share of the global manufactured goods market. The World Trade Organization (WTO) found that the trade flows in manufactured goods has grown from \$4.9 trillion in 2000 to \$12.2 trillion in 2014, but U.S. and global trade have been slowing. According to the Department of Commerce, U.S. manufactured goods exports were valued at more than \$1.3 trillion in 2015.

Trade barriers, however, are on the rise around the world: a disturbing trend noted by the G20, WTO, and other institutions as limiting global manufacturing growth and costing jobs and economic opportunity. As explained further below, manufacturers face not only traditional trade and investment restrictions, but also forced localization barriers, intellectual property theft and export bans. In all of these areas, G20 countries are leading offenders.

In addition to country-specific barriers, however, manufacturers in the United States are increasingly confronting anti-trade initiatives from a number of different international governmental organizations (IGOs) that promoting the proliferation of trade barriers. Such trade barriers impact a variety of areas, including policies to promote localization, undermine intellectual property, and promote trade-disruptive standards and technical regulations.

To address and eliminate these barriers, the United States must leverage all available tools. It must secure ambitious, high-standard commitments in ongoing and future trade

agreement negotiations. It must achieve a path forward to implement and bring into force the Trans-Pacific Partnership (TPP) agreement that will address and set important standards to address many of these types of barriers. It must continue working to implement and bring into force the WTO Trade Facilitation Agreement that will eliminate customs and other trade restrictions at the border. It must enforce multilateral, regional and bilateral trade and investment agreements already in force, including by pursuing formal dispute settlement cases where appropriate. It must implement fully new enforcement provisions contained in the Trade Facilitation and Trade Enforcement Act of 2015. It must improve and use more effectively existing tools and consider common-sense updates to preference program eligibility criteria.

## 1. Import Policies

Manufacturers in the United States face a broad range of troublesome import policies in a variety of markets. This includes excessively high tariffs on imports of manufactured goods imposed by a variety of countries. As one manufacturer noted, many key countries impose higher duty rates as well as other “fees” tacked on to imports that add considerably to the cost of those products and harm the competitiveness of U.S. exports. For example, countries such as **Argentina**, **Brazil**, **Ecuador**, **India**, **Kenya** and **Nigeria** use an average applied tariff rate on non-agricultural goods that is more than three times higher than equivalent U.S. rates, according to data compiled by the WTO. Tariff rates are even higher for selected manufactured products. **India** continues to impose tariffs as high as 100 percent for certain automobiles and 300 percent for textiles and recently hiked tariffs in critical sectors such as information technology and medical devices. **Brazil** maintains high tariffs on a range of critical manufactured products, including chemicals, industrial machinery and automobiles. **Argentina** maintains a high tariff on imports of capital goods and other products than for domestic products, particularly for goods that are also being domestically produced. **Indonesia** maintains high tariffs on a variety of products, including an effective 60 percent import tariff on motorcycle products (in addition to a 75 percent luxury tax and a 10 percent value-added tax.)

Manufacturers – particularly small and medium-sized manufacturers (SMMs) – also face challenges with transparency in being able to understand and navigate import rules, including both tariff rates and import procedures, and find that tariff rates are changed suddenly, with no transparency or notice. In many countries, there are significant discrepancies between the bound rate (the upper limit that cannot be exceeded under WTO rules) and the applied rate (the rate charged at the border on a most favored nation basis). A gap between the two leaves considerable flexibility for governments to change tariff rates with little warning or notice – and it is little coincidence that many of those countries, where transparency in customs rates and rules is the biggest challenge, have significant gaps between their bound and applied rates. Countries with big gaps include **Indonesia** (which has an average applied tariff rate of 6.7 percent versus an average bound rate of 35.6 percent), **Kenya** (11.5 percent versus 57 percent), **Nigeria** (11.4 percent versus 49.2 percent), **India** (10.2 percent versus 34.5 percent), **Turkey** (5.4 percent versus 17.0 percent) and **Thailand** (8.3 percent versus 25.5 percent).

High tariffs are just one of many import barriers manufacturers face in overseas markets. Other barriers, such as import licensing schemes and other restrictions at the border oftentimes are as, if not more, harmful in limiting access for U.S. manufactured goods exports. For example, **Argentina** maintains a wide array of protectionist measures designed to boost local production, protect domestic industry and address balance of payments concerns. These measures appear to violate Argentina’s obligations under the General Agreement on Tariffs and Trade (GATT) and the WTO Agreements on Customs Valuation, Import Licensing Procedures, Technical Barriers to Trade (TBT) and Trade Related Investment Measures.

Most notably, Argentina bans the importation of many processed foods, including ketchup, tomato sauces, fruit and vegetable juices, chocolates, olive oil, canned corn, potato chips, bacon and biscuits in order to protect a few domestic companies. Through an arbitrary and non-transparent reference pricing regime, it delays and adds significantly to the cost of importing competitive products with invoice prices less than the “reference values” for those products determined by government authorities. Argentina also bans the import and sale of a variety of remanufactured products, including agricultural machinery, medical devices and information technology products.

Imports to Argentina also face significant challenges due to licensing and approval requirements initially laid out under its Declaración Jurada Anticipada de Importación (DJAI), the subject of a successful WTO dispute settlement challenged by the United States and several other countries. Following a WTO appellate body determination finding the provisions contrary to WTO rules, Argentina eliminated its original DJAI requirements in December 2015, but replaced it with a new import monitoring system, the Sistema Integral de Monitoreo de Importaciones (SIMI) that has raised concerns for replicating some aspects of the DJAI regime. In particular, companies seeking to import must still register – and be approved – to obtain an import license. Many of those import licenses remain non-automatic, including for many of the same types of manufactured goods that had been restricted under DJAI. This means that importers will still face a specific government approval that could prove a bottleneck for manufacturers looking to export to Argentina. The NAM is monitoring SIMI closely and remains concerned that this new system may not be in full compliance with the WTO’s decision or Argentina’s WTO obligations. The NAM urges the United States to work closely to address these issues quickly.

In **Brazil**, importers not only face high duties, but also a series of cascading federal and state-imposed taxes and import fees that significantly increase the cost of imported goods to end consumers. These taxes and fees apply to a wide range of products, ranging from automobiles to distilled spirits, and are difficult for U.S. and other foreign manufacturers to navigate – particularly small and medium enterprises (SMMs), adding to the complexity and challenges of doing business in Brazil. Even where imported goods do not compete directly with domestic products, these additional costs weaken aggregate demand and limit access to technology and equipment by Brazilian consumers.

**China’s** customs policies and procedures continue to present challenges for importers. Transparency is lacking in the development of new rules and regulations, with interested parties having little to no opportunity for meaningful input before new policies go into immediate effect. The development of China’s soft customs infrastructure has not kept pace with the rapid growth of its stature in the global economy and the development of World Customs Organization (WCO) and other global best practices. For example, China should adopt a more balanced, strategic, risk-based management approach to border clearance consistent with WCO guidelines. Other opportunities for improvement and efficiencies include implementing commercially meaningful *de minimis* and informal entry treatments for low-value shipments; removing unique tax and duty requirements for e-commerce shipments that complicate rather than ease border clearance; providing 24/7 customs service; and increased coordination and harmonization with other border-crossing agencies such as the General Administration of Quality Supervision, Inspection, and Quarantine.

**India** remains a challenging market for manufacturers in the United States, despite its substantial market size. Although Prime Minister Narendra Modi continues to pledge his

commitment to improve the “ease of doing business” in India, India’s high tariff rates and restrictive border measures continue to limit the ability of manufacturers to export there. It is no coincidence that the U.S. exports fewer manufactured goods to India (\$18.5 billion in 2015) than to the United Arab Emirates, Singapore, or Belgium – all countries whose economies are less than one quarter of the size of India’s and who have less than one percent of India’s population.

As noted previously, India maintains high tariffs on a range of manufactured products, including automobiles, textiles, distilled spirits, pharmaceuticals and rubber. India also, however, continues to use varying policy tools to raise tariffs in selected industries in order to protect domestic industry. For example, India has increased tariffs on information technology products multiple times since 2012, including on many products that should enjoy duty-free treatment in India in accordance with India’s commitments as a signatory to the 1996 WTO Information Technology Agreement. In January 2016, India raised import tariffs on a number of medical device products and withdrew several previously offered exemptions, effectively raising import tariffs further.

India’s customs and border practices are extremely complex, non-transparent and highly cumbersome to navigate. Depending on their product, importers to India may face a combination of duties, including a basic customs duty, various “additional duties,” an education assessment (known as a cess) and a landing fee. This makes it challenging simply to determine the effective rates for customs tariffs, excise duties and other duties and charges that their products will face – a fact that discourages many companies from bringing their products to India. Although Indian customs’ online platform provides some options to aid companies in understanding duty rates, it does not fully address the complexity and the lack of transparency in the system as a whole. Additionally, other import procedures and processes could be improved or rationalized to allow U.S. exports to move seamlessly across Indian borders. These include the option to transmit customs documentation electronically in all modes, simplified Know Your Customer (KYC) documentation requirements, 24/7 availability of customs officials at major ports, time-definite customs clearance procedures, and a commercially meaningful *de minimis* threshold that is applicable to commercial shipments.

To address these and other troublesome policies in India, the NAM and 16 other leading business associations representing nearly every sector of the U.S. economy continue to work together as part of the Alliance for Fair Trade with India (AFTI) (<http://aftindia.org>). AFTI is working with Congress, the Administration and partners around the world to push back against unfair Indian policies and to ensure they are not repeated in the future.

In **Korea**, implementation of the U.S.-Korea Free Trade Agreement (KORUS FTA) continues to require attention. These issues include Korea’s failure to implement fully *de minimis* rules to eliminate red tape for small-value shipments, including e-commerce, as well as the Korean Customs Service’s onerous and lengthy processes for post-import origin verification audits on imported products. Such processes require unnecessarily large amounts of information on imported products on short timelines, with limited transparency on proper certifications.

Under the terms of its accession to the WTO in 2012, **Russia** agreed to lower customs duties and to eliminate other import restrictions on a variety of products. While, Russia’s applied tariff rate has dropped considerably in a variety of products, the Russian government continues to maintain non-WTO consistent restrictions that impact a variety of products. For example, Russia refuses to include foreign food exporters on their approved list of eligible exporters, a policy that appears to violate its WTO commitments. On combine harvesters, Russia continues

to maintain an import quota managed through a complex and cumbersome import licensing procedure despite an agreement to address tariffs and import restrictions. These procedures limit market access for combines manufactured abroad to just 400 units (compared with typical sales for domestic companies of 1,200 per year). The quota also prevents the entry of most combines until after the harvesting season, when demand is low.

Since 1996, **Colombia** has maintained a discriminatory spirits tax that has the effect of applying a lower rate per degree of alcohol to domestically-produced spirits than most imported spirits, and appears to violate Colombia's WTO obligations to not discriminate. Under the U.S.-Colombia Trade Promotion Agreement, Colombia committed to bring its discriminatory spirits tax regime into compliance with its WTO obligations by 2016 and also to accept the national treatment obligations and the prohibitions against trade restrictions related to the operation of the country's state alcohol monopolies. In October 2016, the Colombian Senate offered final approval of a draft bill on alcoholic beverages that appears to address some of these concerns, but the final bill must still undergo a conference process with the Colombian House of Representatives and be signed by the President. The NAM is closely monitoring to determine whether these steps are completed and fully address concerns.

Other country-specific issues related to imports include restrictions on the import and export of mobile phones and parts in **Colombia**, proposals to ban imported remanufactured medical devices in **India**, policies to reduce mobile phone imports in **Ecuador**, challenges with customs valuation procedures for software in **Ghana**, new documentary requirements for importers in **Mexico** and high fees in **Turkey** for pharmaceutical products related to national reimbursement lists.

The NAM has been a strong supporter of the **WTO Trade Facilitation Agreement** (TFA) and is pleased to see continued efforts to have the agreement ratified by the requisite two-thirds of WTO member states. Recent ratifications by Mexico, Senegal, Bahrain and Bangladesh have brought the number of countries closer to the required two-thirds of WTO members. Key countries such as **Argentina, Canada, Chile, Colombia, Indonesia, Israel, the Philippines** and **South Africa** – all in the world's top 50 by trade volume – still have yet to ratify the TFA. Most countries that have ratified the agreement have only submitted their Category A commitments (those that will be implemented when the agreement enters into force, or within one year of that date for a least-developed country (LDC)), but have yet to submit remaining Category B and Category C commitments that have a transition period. Full implementation of the TFA is important for all WTO members in order to ensure the elimination of a broad range of border barriers that impede U.S. exports and undermine foreign countries' participation in global trade and supply chains. The NAM urges USTR to highlight countries' failure to implement this important agreement as part of its annual reporting.

## 2. Investment Barriers

Overseas investment is critical to expanding U.S. exports and sales to foreign markets – and to supporting high-value activities at home. In 2013 (the last year for which data is available), businesses with foreign investments accounted for nearly a quarter of U.S. private sector output (23.8 percent) and generated nearly half of total U.S. goods exports (49.9 percent) and roughly three-fourths of R&D expenditures from all U.S. businesses. The vast majority of sales by overseas subsidiaries of U.S. companies, which equaled about \$4.3 trillion that same year, were destined for other foreign markets.<sup>9</sup> Inward investment into the United States also

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<sup>9</sup> Sarah P. Scott, "[Activities of U.S. Multinational Enterprises](#)," *Survey of Current Business*, August 2015.



provides important benefits, supporting millions of U.S. manufacturing jobs and increased U.S. capital investment and research and development.

While the United States has a very open investment climate, other countries restrict the ability of U.S. firms to invest through a variety of laws and regulations. These restrictions undermine the ability of manufacturers in the United States to access overseas markets and grow their businesses. These restrictions vary considerably, including outright bans on foreign investment in particular sectors, equity caps that force companies to form joint ventures with local companies, cumbersome foreign investment approval processes that provide leverage from governments (and companies) seeking to extract concessions from potential investors, screening processes based on vague definitions of national security and attempts to undermine critical investor-state dispute settlement processes in free trade agreements (FTAs).

Many of the countries with which the United States government negotiated investment commitments through the pending TPP agreement still maintain substantial barriers that must be eliminated to address competitive imbalances. For example, **Canada**, **Australia** and **New Zealand** maintain non-national security-based investment screening mechanisms. **Malaysia** prevents overseas individuals and firms from acquiring more than a 70 percent stake in local businesses. **Mexico** still retains investment restrictions in the energy sector, even after its December 2013 energy reforms, and other sectors (such as forestry) remain closed to foreign participation. Even after **Vietnam** implemented its new Investment Law in July 2015 with a “negative list” approach, limitations still remain in sectors ranging from construction to energy exploration. The final TPP agreement will address many of these issues, making passage – and robust implementation – an important avenue to address longstanding barriers in these countries facing manufacturers in the United States.

In **China**, NAM members have long faced investment caps in key manufacturing sectors such as agricultural processing, automotive and telecommunications, forcing them to form joint ventures with domestic companies under the Catalogue Guiding Foreign Investment. Problematically, this allows government and company stakeholders leverage to seek concessions from foreign companies – including investment commitments, local sourcing and access to capital and technology – in exchange for investment approval. In September 2016, the National People’s Congress approved revisions to its main foreign investment laws, shifting from investment approvals to required filings for a wide swath of sectors and revising investment approval processes. On the same day, the Ministry of Commerce announced that it was broadening the coverage of an investment “negative list” – an approach to domestic investment regulation that would allow foreign investment in any sector not specifically listed – from four free trade zones to the entire country. China, however, has yet to release the details of the list. China and the United States are in the process of negotiating a Bilateral Investment Treaty that could eliminate many of these longstanding investment barriers and prohibit forced localization requirements and incentives for investment, but only if it is robust, with as few sectors in China’s negative list as possible and strong disciplines protecting market-oriented U.S. investment in China.

**India** has taken steps to eliminate some of their existing investment caps relevant to manufacturers, including developments in the last two years to allow full foreign investment in railway infrastructure, defense and food processing, higher greenfield investment caps in pharmaceuticals and the elimination of investment restrictions in sectors such as construction. Efforts to promote more competition among states to attract investment and to move forward the Goods and Services Tax are both positive steps in promoting greater efforts to eliminate investment barriers. Such efforts should be placed into context, however: investment bans or



limitations remain in place in sectors such as defense, while in other sectors – such as food processing – the path and timing of proposed liberalization remains unclear.

Of greater concern are countervailing investment trends in India that undermine the Modi government's attempts to make India a top global investment location. India's finalized model BIT showed a significant departure from international best practices on investment, as detailed in the NAM's April 2015 comments to the Indian government.<sup>10</sup> India's subsequent announcement that existing BIT partners would have to renegotiate their agreements on the basis of the new model brings into question the level of India's commitment to protecting the investment it is now seeking to attract. India has also sent negative investment signals in various sectors. For example, in sectors with longstanding investment in India, such as tobacco, proposed tightening of investment rules that would prohibit investment in technology collaboration and licensing send negative signals. Manufacturers urge the United States to work with the Indian government to prevent backsliding on India's efforts to promote a positive environment for foreign investors that treats them equally with their domestic competitors.

**Russia's** investment regime, including the Investment Law and Strategic Sectors Law, permit the government significant flexibility to prohibit or set restrictive conditions on foreign investment on undefined terms such as "public morals and health," and to require pre-approval of a controlling stake in investment projects that fall under strategic sectors. Additionally, under the July 2015 Decree 708, manufacturers in the United States that wish to obtain the strongest possible tax and financial terms for their investment in Russia must negotiate and sign a Special Investment Contract (SIC), in order to access fully Russian markets and compete fairly with domestic producers.

Other countries, such as **Ecuador** and **Venezuela**, have taken measures against foreign investors in ways that undermine their investment climates. Additional countries where manufacturers face considerable investment restrictions include **Brazil, Equatorial Guinea, Ghana, Indonesia, Nigeria, Russia, Taiwan** and **the Philippines**.

As U.S. investors confront these investment and other trade barriers, it is critical that they have the tools to be able to address them and ensure fair treatment. Investor-state dispute settlement (ISDS) provisions included in U.S. agreements with more than 50 countries and in thousands of other treaties around the world are essential to help manufacturers increase exports abroad and grow and maintain jobs here at home. This longstanding enforcement tool ensures U.S. investors overseas have the same fundamental protections against discrimination, denial of fair treatment, contract breaches and seizure of private assets as they do in the United States. It also enables manufacturers to address forced technology transfer and damaging localization requirements and incentives from foreign governments that undermine U.S. manufacturing. Robust market access, investor protections and ISDS enforcement are critical and must be included in future U.S. agreements and bilateral investment treaties (BITs).

### 3. Forced Localization Barriers

Forced localization barriers, including measures designed to protect, favor or stimulate domestic industries and interests at the expense of goods, services and intellectual property from other countries, are proliferating in key emerging markets. Such barriers can violate

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<sup>10</sup> National Association of Manufacturers, "[Comments on Draft Indian Model Bilateral Investment Treaty](#)," April 10, 2015.

fundamental national treatment provisions of the GATT and various WTO Agreements, as well as more detailed provisions in U.S. FTAs and U.S. BITs. Some of these measures are already the subject of ongoing WTO dispute settlement cases.

Forced localization poses a serious and growing threat to manufacturing and jobs in the United States, blocking trade in strategic and innovation-intensive sectors and undermining hard-won technology and productivity gains that have made our nation one of the most competitive producers in the world. A 2013 study by the Peterson Institute for International Economics estimated that the reduction in world trade caused by just one type of forced localization barrier, local content requirements, amounts to \$93 billion annually.<sup>11</sup>

**India's** array of forced localization barriers poses a particularly serious competitive challenge to manufacturers in the United States. The U.S. International Trade Commission's most recent investigation of India's trade policies – and the NAM's detailed submission for that investigation<sup>12</sup> – documents many of these barriers in detail and their impact on industries from solar energy to pharmaceuticals, from medical devices to pharmaceuticals.<sup>13</sup> Many of these policies stem from India's 2011 National Manufacturing Policy, which called for local production of everything from information technology and clean energy equipment to medicines and medical devices. Examples of direct localization policies include India's Preferential Market Access (PMA) policy on computers and electronics (which was subsequently limited in scope to government procurement), new efforts earlier this year to engage on a possible new PMA policy for medical devices, local production requirements for telecommunications products and local content requirements for domestic solar modules and cells. Other policies, such as India's policies and practices related to intellectual property, also appear designed to protect domestic companies and industries (such as domestic generics companies) at the expense of innovative foreign companies. (For more detail, see Section 4 on the lack of intellectual property rights protection, particularly p. 13-14 on India.)

Since 2003, **Colombia** has required the scrappage of an existing truck or payment of a fee before the purchase or importation of a new heavy-duty truck. This regime has long distorted the sales of heavy-duty trucks, of which 92 percent were supplied by U.S. original equipment manufacturers (OEMs) before the elimination of the fee versus six percent by local assemblers and two percent by other importers. In 2013, Colombia abruptly amended its "scrappage" regime and eliminated the fee option without notice to importers or to the WTO. These provisions appear to violate Colombia's bilateral and global trade commitments, causing large economic losses to importers and a significant drop in market share that harmed manufacturers in the United States. A recent regulation issued by the Colombian government touches on some of these issues, but it is not clear that it provides lasting solutions to these challenges due to provisions that require a market study to ensure "balance" in the market, a lack of implementing detail and a long implementing timeline.

**Russia** maintains forced localization barriers in a variety of sectors, including pharmaceuticals, telecommunications and heavy equipment. For example, the July 2015 Decree 719 and a recent update provided by Russia's Ministry of Industry & Trade detail a process whereby foreign manufacturing investors seeking to be recognized as a "local manufacturer" and obtain full access to the Russian market must follow a rapid process to

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<sup>11</sup> Gary Clyde Hufbauer, Jeffrey F. Schott et al., [Local Content Requirements: A Global Problem](#), Peterson Institute for International Economics, September 2013.

<sup>12</sup> National Association of Manufacturers, [Pre-Hearing Statement](#), USITC Inv. 332-550, April 23, 2015; NAM, [Post-Hearing Brief](#), USITC Inv. 332-550, May 12, 2015.

<sup>13</sup> U.S. International Trade Commission, [Trade and Investment Policies in India, 2014-2015](#), September 2015.

increase their local content to approach full localization by 2025. Other decrees provide additional incentives to local manufacturers: for example, a series of May 2016 decrees (Decrees 417, 419 and 421) offered local manufacturers a 90 percent offset from a number of important fees and operational costs, such as recycling fees, workplace maintenance costs and energy consumption costs. These subsidies appear to contradict not only WTO trading rules, but also the Russian Constitution and other laws.<sup>14</sup>

Other Russian government regulations and practices discriminate against U.S. medicines exporters in favor of domestic producers through a national reimbursement system that gives Russian companies a 15 percent price preference and allows only domestic companies to request annual adjustment of registered prices. Additionally, the Russian government reserves certain telecommunications opportunities only for equipment made in Russia by majority-owned Russian firms. The Ministries of Economic Development and Industry & Trade determine what constitutes a domestic telecommunications equipment, based on the scope of the research activities and technological operations carried out in Russia and other aspects of their operations.

**Brazil** has made widespread use of localization policies in order to boost domestic industries. Perhaps the biggest example is the Plano Maior Brasil, launched in 2011 as a series of industrial plans and targets to promote investment and innovation through a range of tax, tariff and financing incentives to encourage local production. The plan included specific local content requirements for exports to qualify for tax incentives and extended policies that provide higher tax rate for autos that cannot meet certain criteria for local content, required levels of local engineering or R&D, fuel efficiency and emissions standards, or labeling standards. Since the plan was released, Brazil has sought to implement other local content requirements, including preferential financing in the energy, steel and machinery sectors, as well as tax incentives for localized information technology products.

Manufacturers in the United States continue to see a variety of localization policies in **China** that create harmful trade barriers as manufacturers seek to export and invest in that market. For manufacturing sectors, China's "Made in China 2025" is the best recent example. This policy framework, initially launched in May 2015, is an ambitious ten-year plan designed to upgrade China's manufacturing economy. The plan sets specific targets for domestic manufacturing – 40 percent domestic content of core components and materials by 2020 and 70 percent by 2025 – as well as targeting ten priority sectors such as information technology, new-energy vehicles, agricultural equipment and robotics. While the plan's overarching objective of promoting smart manufacturing policies in China is common to many countries, the specific implementation and localization targets of the plan seek to benefit Chinese manufacturers over foreign ones, raising significant questions about the consistency of policies with China's WTO commitments.

Over the last few years, the Chinese government has also released a series of government policies that mandate the use of "secure and controllable" technology and software – a term that in practice favors domestic companies by requiring foreign products to undergo intrusive local security testing, implement local encryption algorithms, comply with China-specific security standards, disclose source code and other sensitive and proprietary information to the Chinese government and engineer products to restrict the flow of cross-border data. For

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<sup>14</sup> These subsidies may contradict Article 34 of the Constitution of the Russian Federation (which covers unfair competition) and Article 15, Section 1 of Russia's 2006 Federal Law No. 135-FZ "On Protection of Competition" (which prohibits regulations which preclude, limit or eliminate competition).

example, China released a revised draft of its Cybersecurity Law in July 2016 that left unaddressed a number of concerns raised on earlier drafts, including continued restrictions on data flows and data localization requirements, broad obligations on content monitoring and blocking. Specific challenges include discriminatory policies relating to local data storage of Chinese customer information, requiring audits of companies' cyber security systems, and requiring secure and controllable technology. Other policies include the National Security Law, the Counterterrorism law, August 2016 opinions on strengthening the standardization of national cyber security, and sector-specific provisions in banking and insurance. Other localization policies in China include required local testing and certification requirements for products in the information, communications and technology (ICT) and medical sectors, policies requiring companies to store China-generated data on local services and prohibiting its transfer overseas, expedited product approvals for innovative medical device products that generally favor domestic products and implementation of China's revised Food Safety Law to prevent stricter standards for imported food and agriculture products.

Around the world, an increasing number of countries – both developed and developing – have introduced or are actively contemplating introducing laws that would restrict cross-border data flows and/or impose server and data localization requirements. Such requirements would impose steep costs and significant operational challenges not only on providers of data storage and other services, but also on manufacturers who rely on those services. Manufacturers have seen new barriers proposed or considered in many markets, such as **Brazil, China, Germany, India, Indonesia, Korea, Malaysia, New Zealand, Nigeria, Russia, Turkey and Vietnam**. For example:

- **Brazil's** national legislature previously debated a local data storage requirement that would have required all data relating to Brazilian operations of both domestic and international companies, as well as Brazilian citizens, to be stored in the country. While the requirement was stripped from the "Civil Internet Framework," there are some reports that such legislation may be reintroduced.
- In **China**, the draft Cybersecurity Law and other proposed or widely discussed measures would require foreign companies to store any data collected in China on local servers. Reports also indicate that China is considering other data localization policies related to Internet-based mapping applications. China's Internet controls are also increasingly making it difficult for companies to operate in that country.
- **India's** National Telecom Machine-to-Machine (M2M) Roadmap, issued in May 2015 by the Department of Telecommunications, has raised concerns about potential inclusion of restrictions on data flow – particularly given data localization requirements included in July 2016 draft guidelines for regulating M2M service providers in India.
- **Indonesia** has also put in place rules to require the use of local data centers and servers. In 2016, Indonesia also proposed new regulations that included unnecessary and burdensome data localization requirements for e-commerce providers.

Given the wide breadth of growing restrictions and the importance of this issue across the manufacturing industry, the NAM has sought binding and enforceable new obligations in ongoing trade talks to permit the flow of data across borders and to prohibit information technology localization requirements. Such provisions were included in the TPP, which represents a major advancement on disciplines in this area. The NAM urges the United States to include similar provisions in the ongoing Transatlantic Trade and Investment Partnership (TTIP) talks, as well as future trade negotiations.

Manufacturers are also concerned by local content requirements in the ICT industry in **Brazil, Indonesia and Nigeria**, provisions granting market authorization for pharmaceuticals only to companies with local manufacturing arrangements in **Morocco**, preferential registration processes for local pharmaceutical manufacturers in **Algeria** and inconsistently applied local content and manufacturing requirements underneath **South Africa's** Black Economic Empowerment (BEE) program.

#### 4. Lack of Intellectual Property Protection and Enforcement

Innovation drives and supports U.S. global leadership in manufacturing by companies large and small. The latest Department of Commerce report released in September 2016, for example, showed that intellectual property (IP)-intensive industries support at least 45 million U.S. jobs and contribute more than \$6 trillion to U.S. GDP, or nearly 40 percent of the economy.<sup>15</sup>

The ability of innovative manufacturers to protect their intellectual property around the world is a critical component of their business success and a driver for future innovation. The challenges of protecting innovation and intellectual property, however, are real for companies of all sizes. For SMMs, in particular, the cost and complexity of protecting their rights around the world can be very high relative to their annual sales. Innovative manufacturers in the United States benefit from a number of international IP agreements such as the WTO's Agreement Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual Property Office's body of international IP treaties such as the Patent Cooperation Treaty and Madrid Protocol, in addition to U.S. FTAs with stronger IP chapters. Despite those protections, there is much more work to do to ensure the global intellectual property system enables small businesses to effectively protect their ideas, brands and inventions.

The NAM provided detailed comments on the challenges that manufacturers face around the world in a [detailed submission](#) to the U.S. government's "Special 301" process in February 2016. The NAM remains highly concerned about the risk of IPR erosion, a trend occurring both at the global level as well as in individual markets. The global framework of patent protections, particularly for clean technology, energy, healthcare and other advanced manufacturing products, is being challenged in a range of international forums. In the World Intellectual Property Organization (WIPO), the World Health Organization (WHO) and at the United Nations (U.N.), some member states and allies at non-governmental organizations continue to call for expanded use of compulsory licensing to obtain free access to clean technology and healthcare innovation. Those calls are similar to broader efforts across the UN system to position IP as a barrier to the treatment of disease, the development, dissemination and deployment of clean technologies, and to access to entertainment and information products. Recent high-profile examples include the highly [troubling U.N. High-Level Panel on Access to Medicines](#) that ran from November 2015 until September 2016, and [efforts during the 2015 United Nations Framework Convention on Climate Change \(UNFCCC\) COP21 conference in Paris](#) that were ultimately rejected. While many of these debates are playing out in multilateral forums, they are also already starting to influence IP discussions at the national level in countries ranging from **Colombia and Ecuador to India and Indonesia**.

Similarly, efforts are underway to undermine global trademarks in a variety of ways. First, the **European Union** continues to advocate heavily for stronger protection for its food and

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<sup>15</sup> U.S. Department of Commerce, "[Intellectual Property and the U.S. Economy: 2016 Update](#)," September 2016.

agricultural products by creating a new global system of protection as geographical indications (GIs), a push that would undermine the ability of the U.S. and other countries to protect existing trademarks in these products as well as to ensure fair treatment for those making products on terms already treated as generic. This push has appeared in EU efforts to negotiate bilateral trade agreements with a variety of important U.S. trading partners, including **Korea, Vietnam, Canada, Peru, and Morocco**.

Additionally, the NAM has seen increased attempts to constrain use of trademarks in the name of public health or other goals. **Australia** has enacted legislation and regulations prohibiting the use of trademarks on tobacco products or “anywhere on the retail packaging of tobacco products”. This measure harms the use of all types of trademarks and appears to violate Australia’s commitments under multiple articles of the WTO TRIPS Agreement. NAM members are concerned that efforts to undermine trademark rights in any particular product area will have ramifications globally across other industries. Australia’s “plain packaging” legislation and regulations are the subject of an ongoing WTO dispute settlement case, but that has not stopped other countries from considering these rules. The **United Kingdom** and **France** began transitional implementation of plain packaging rules earlier this year, and **Ireland** has adopted but not yet implemented plain packaging measures. As well, many other countries are already considering similar rules, including **Chile, Hungary, India, Malaysia, New Zealand, Norway, Singapore, South Africa** and **Turkey**.

Trade secrets and confidential business information are often the most critical assets for manufacturers – particularly SMMs – and a core part of their competitiveness. Such trade secrets, which by definition are undisclosed, have considerable economic value. Unfortunately, due to that economic value, trade secrets are coming under increasing attack from competitors, at times with the support of foreign governments. Trade secret theft is on the rise, both via physical and electronic means.<sup>16</sup> Lack of effective trade secrets protection and enforcement is a growing challenge in many markets from **India** and **Brazil** to **China**. In addition, manufacturers in the United States also face challenges from countries requesting confidential business information without guaranteeing its protection or allowing companies to redact sensitive information. For example, under **Canada**’s revised Workplace Hazardous Materials Information System, companies face a set of challenging options: they must provide the government with sensitive business information (either exact chemical concentrations or product-specific concentration ranges), or they must pay a per-product application fee for review and approval of the confidentiality of chemical concentrations, an option that quickly becomes expensive. These requirements are out of line with both corresponding U.S. and European regulations. Similarly, companies report instances in which customs officials in **China** press importers of certain chemical formulations to supply proprietary information, including the name and percentage of each specific monomer as a condition of customs clearance. The NAM welcomes the trade secrets provisions contained in the TPP and views trade-secret protection commitments as a priority in the ongoing TTIP negotiations.

Many countries lack meaningful legal deterrents against counterfeiting or suffer from insufficient weak enforcement mechanisms – and insufficient capacity or political will to strengthen those enforcement mechanisms – to address the flow of counterfeiting and piracy that continue to harm manufacturers of a wide variety of products, including agricultural

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<sup>16</sup> Almeling, D.S., Snyder, D.W., Sapoznikow, M., McCollum, W.E., and Weader J., “A Statistical Analysis of Trade Secret Litigation in State Courts,” *Gonzaga Law Review* (2011) at, pp. 57-101; Baker & McKenzie, “Study on Trade Secrets and Confidential Business Information in the Internal Market,” (2013, prepared for the European Commission.

chemicals, auto parts, consumer goods, machinery, pharmaceuticals, and software. Counterfeiting and piracy impact countries around the world, but NAM members are highly concerned by the role of **China** (both directly and via **Hong Kong**) as the world's major hub for counterfeiting, with **Canada, India, Korea, Russia, Singapore, Taiwan, Turkey** and the **United Arab Emirates** as other problematic sources and transshipment points for counterfeits.

Enforcement mechanisms must not only include traditional physical counterfeiting markets and cross-border transit routes, but consider all means by which counterfeit products are circulating, including online auction sites in **China** such as Alibaba and Taobao that have pledged actions but have yet to address concerns for many brand-owners facing rampant counterfeiting via their platforms. Other means that must be tackled include transit of counterfeit products via inadequately policed free trade zones in markets around the world,<sup>17</sup> and illegal use by overseas rogue sites and remote sellers of international mail services and airmail such as the China-based express mail service of the China Post.

To help meet this challenge and stop unfair competition from the use of stolen intellectual property, the NAM has joined more than a dozen other business associations and some 275 manufacturers across the country to form the National Alliance for Jobs and Innovation (NAJI) (<http://naji.org>). By addressing the unfair cost advantage that results when foreign manufacturers use pirated software and other stolen intellectual property, NAJI hopes to increase awareness and ensure a level playing field for businesses in the United States. The NAM also provided detailed comments to the development of 2016 Joint Strategic Plan on Intellectual Property Enforcement being coordinated by the White House's Office of the U.S. Intellectual Property Enforcement Coordinator (IPEC).

Though **China** has recognized the importance of IP protection for economic growth, manufacturers in the United States still face considerable challenges protecting intellectual property in China – many of which are included in detail in the NAM's September 2016 [detailed comments on China's Compliance with Its WTO Commitments](#). These issues include:

- Continued weaknesses and questions about implementation of core IP laws such as the Patent Law, Trademark law, Copyright Law, and the Anti-Unfair Competition Law (which covers trade secrets);
- Growing efforts to incorporate IP into other regulatory areas – such as appropriate use of IP under the Anti-Monopoly Law and related competition regulations and royalties and participation by IP holders in standard-setting processes standards – in ways that sometimes that raise concerns and questions about their consistency with WTO obligations.
- Efforts to promote “indigenous innovation” at the expense of foreign companies, products, and technologies through various industry development policies, including China's “Made in China 2025” program, cybersecurity-related policies that mandate “secure and controllable” technology, provincial indigenous innovation catalogues of largely domestic products, and policies that provide expedited approval for innovative domestic products in sectors such as medical devices;
- Inadequate or ineffective enforcement of not only trademarks and copyrights but also trade secrets, fueled by structural policy barriers, including value thresholds that prevent criminal prosecution for IP infringement in most cases, low fines and damages that do

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<sup>17</sup> Business Action to Stop Counterfeiting and Piracy, “[Controlling the Zone: Balancing facilitation and control to combat illicit trade in the world's Free Trade Zones](#),” International Chamber of Commerce, May 2013.



not deter counterfeiters, insufficient coordination among different agencies and levels of government.

- Inappropriate and unnecessary requests for confidential business information in some cases from government entities related to licensing and approval, such as requests for chemical formulations for products being imported without appropriate mechanisms to ensure protection of highly sensitive information.

Manufacturers in the United States also face a series of specific concerns in China, including IP licensing, China's draft "service invention" regulations, issues related to patent quality, acceptance of supplemental data for pharmaceutical patents, and questions surrounding court decisions related to trademarks and original equipment manufacturers (OEMs).<sup>18</sup>

Although the U.S. and **India** are engaging more frequently on intellectual property issues, India remains a challenging market for innovators and IP rights-holders across the board – not only those concerned with patents, but also trade secrets, copyrights, and brand protection. India's new National Intellectual Property Policy, released in May 2016, included some positive language that recognizes on the importance of IP for economic development, but few specific actions, even removing some of the detail in earlier drafts related to proposed legal reforms. Additionally, the policy fails to address many of the most significant outstanding issues that NAM and its members have in India. India continues to deny patent protection for inventions that would otherwise meet internationally accepted criteria, and to apply extra patentability criteria, specifically a fourth "enhanced efficacy" test under Section 3(d) of the Indian Patent Law that goes beyond internationally acceptable practices under TRIPS. This criterion continues to be used to deny, invalidate, or revoke patents widely granted around the world, and as a basis to issue compulsory licenses. Despite a welcome pause in such compulsory license threats and decisions over the past year, the NAM remains concerned that as long as these criteria remain on the books, government and judicial officials could use these criteria as a tool to protect and grow India's domestic industries at the expense of U.S. innovation and IP. Other issues faced by manufacturers in India include ineffective patent enforcement for pharmaceutical patent holders, inadequate and ineffective protection for trade secrets, proposed rules on technology licensing, language in India's 2011 National Manufacturing Policy encouraging compulsory licensing of green technology, its 2011 National Competition Policy that requires IP owners to license "essential facilities," and India's vocal stances in multilateral forums challenging the value of IP systems.

**Russia** continues to demonstrate weak IP enforcement, including the persistent presence of counterfeit and pirated products both produced in and transshipped through Russia. Manufacturers operating in Russia also face practical barriers to using legal protections. The Russian Arbitration Procedural Court rarely – if ever -- grants preliminary injunctions, frustrating company efforts to resolve potential patent issues before potentially infringing pharmaceutical products are launched on the market. Additionally, innovative manufacturers in practice lack effective mechanisms to resolve patent disputes prior to the launch of generic products. Trade secret protection is a particular problem in Russia, due to a variety of barriers created both by

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<sup>18</sup> This includes not only the Supreme People's Court November 2015 decision in *Focker Security International v Zhejiang Yahuan Lockset* as well as the Jiangsu High Court's December 2015 decision in *Shanghai Diesel Engine Co. Ltd. v. Jiangsu Changjia Jinfeng Power Machine Co. Ltd.*

("Changjia"). The court acknowledged the reasoning in *Focker* but effectively distinguished it, holding on the facts of the case before it that a China OEM manufacturer had duties beyond confirming that their client has legal rights to an applied trademark in the destination jurisdiction.



overly prescriptive requirements in the 2004 Federal Law on Commercial Secrecy that businesses must meet to bring a trade secrets case, judicial practices that apply limited penalties for trade secrets breaches despite a full set of legal options available under the Civil Code, and weak enforcement of trade secrets protection throughout the system. Changes both to legal provisions and court practice are needed to address these issues in full. Additionally, the NAM has concerns about potential compulsory licensing issues in Russia. The Federal Anti-Monopoly Service (FAS) is drafting regulatory amendments to enable compulsory licensing for medicines during periods of epidemics. In view of comments made by senior Russian officials alleging that some unnamed patent holders are abusing IP rights to gain a monopoly on the market and set high prices, the NAM is concerned that the government could promote compulsory licensing in certain circumstances to promote generic medicines over innovative medicines. These revisions are expected to be taken up by the Duma this fall.

The NAM continues to have considerable concerns with **Canada's** "promise doctrine" for patents, which requires an innovator generally must heightened evidence that that demonstrates "or soundly predicts" a subjectively construed "promise of the patent" – a criteria that is applied nowhere else in the world and has been used to reject or invalidate a significant number of innovative patents in various industries that have been granted elsewhere. As [NAM explained in its amicus briefing](#) filed and accepted in the ongoing NAFTA Chapter 11 case against this provision, this doctrine appears to be inconsistent both with TRIPS and Canada's obligations under the North American Free Trade Agreement (NAFTA), and has severely undermined patent protection for innovators in the United States and elsewhere and had the practical effect of rendering medical innovation all but unpatentable in Canada. In addition, Canada passed its Copyright Modernization Act several years ago. However, U.S. right holders continue to face challenges protecting and enforcing their copyrights in Canada. The law contains broad exceptions, which have been exacerbated by court decisions. Similarly, Canadian courts have placed a high burden on copyright owners to establish liability in the online context. Canada's choice of a purely informational notice, rather than a notice and takedown system, has contributed to continued problems with online piracy.

Provisions in **Colombia's** national development plan undermine the protection of intellectual property and innovative pharmaceutical and biologics approvals, and registration will delay the introduction of new medicines in Colombia. In particular, manufacturers are concerned that Articles 69 and 70, which diverge substantially from international practice regarding the use of compulsory licensing and patentability may violate Colombia's WTO TRIPS obligations and undermine strong IP protection for manufacturers in the United States. Manufacturers are also concerned by Article 72 that would integrate regulatory review and pricing and marketing processes in a manner that would delay regulatory approvals, undermine objective medical reviews and create significant regulatory barriers to marketing authorization in Colombia. Additionally, the NAM is increasingly concerned about recent actions related to Colombia's respect for IP, including its recent use of the declaration of public interest (DPI) process impacting innovative medicines.

**South Africa** is also in the midst of drafting a new consultative IP framework, and has been through multiple rounds of public comment. The framework recognizes the value of IP as a means of promoting R&D, innovation, and economic growth and creates new mechanisms to foster interagency coordination on these issues. However, the policy also strongly encourages greater use of compulsory licensing and TRIPS flexibilities and setting patentability requirements specific to South Africa (versus being in line with international obligations and norms). The NAM encourages the U.S. government and other stakeholders to engage directly

with the Department of Trade and Industry to ensure that the framework does not undermine innovation and IP.

**Indonesia's** new Patent Law contains a number of concerning provisions that will weaken, rather than strengthen, Indonesia's IP system—making the country a less attractive investment destination. In particular, the NAM is very concerned about implementation of measures that would narrow the scope of patentable subject matter, require disclosure of the origin of genetic resources or traditional knowledge, discourage voluntary licensing of technology, and provide for compulsory licensing on vague and arbitrary grounds that are inconsistent with Indonesia's international obligations.

In addition to its efforts to promote plain packaging mentioned above, **Australia** maintains a unique policy enabling the Department of Health to seek damages from patent holders that pursue unsuccessful patent claims, creating a significant hurdle for companies seeking to defend their legitimate patent rights. Those damages are designed to compensate Australia's pharmaceutical reimbursement scheme (PBS) for any higher price paid for a patented medicine during the period of a provisional enforcement measure. Since 2012, this policy has resulted in at least three cases against innovative pharmaceutical companies. Such efforts create uncertainty for businesses, undermining R&D, innovation, and investment. They also unfairly penalize inventors who have sought to defend their legitimate patent rights. Additionally, the policy creates a conflict of interest by permitting the same government that examined and granted a patent to seek damages if that patent is later ruled invalid or not infringed. They appear to be inconsistent with WTO intellectual property rules, including with respect to provisional measures.

Protection of undisclosed test and other data for various industries – including pharmaceuticals and agricultural chemicals – remains a serious problem in **India** and **Russia**, and also is a factor in markets such as **Algeria, Canada, Egypt, Jordan, Morocco, Saudi Arabia** and **Tunisia**. None of these countries effectively protect against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products. In many other countries – including **Algeria, Canada, Egypt, Jordan, Morocco, Saudi Arabia** and **Tunisia** – governments are using non-transparent actions and aggressive use of reference pricing to drive down the price for innovative products in ways that have a negative impact on IP protection and business incentives that drive future innovation.

## 5. Standards and Technical Regulations

Unique regulatory and technical standards and conformity assessment requirements can add significantly to the cost of manufacturing exports to countries around the world – often a multiple of the tariff rate actually charged on a product. The NAM works to prevent and reverse the proliferation of unique regulatory and technical standards as trade barriers by promoting reliance on the TBT Agreement, as well as the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), as the basis for developing national and international standards, technical regulations, and conformity assessment rules that provide national treatment for conformity assessment bodies. The NAM was pleased to see strong SPS and TBT chapters included in the TPP Agreement, and is similarly seeking strong TBT and SPS provisions in the TTIP and future negotiations.

Standards, technical regulations and conformity assessment procedures should be applied evenly to both imported and domestic goods and should be undertaken in a manner that

is focused on achieving their objective without spillover effects. They should be based on scientific evidence and consider regulatory impact for all stakeholders. They should be transparent and allow reasonable opportunities for public access to all stakeholders. When national laws, regulations, policies, and practices do not conform to these global norms, further action is needed in the WTO and through bilateral and regional agreements to reduce the use of technical standards as trade barriers.

Additionally, the NAM firmly believes that the definition of an “international standard” should include not only international bodies such as the International Standardization Organization (ISO) or International Electrotechnical Commission (IEC), but also private-sector standards that are broadly used around the world. The NAM has urged this approach in international fora, such as the WTO, regional and bilateral negotiations, including with the **European Union** for the Transatlantic Trade and Investment Partnership, and also with respect to individual markets around the world. For example, in **Saudi Arabia**, the Saudi Standards, Metrology, and Quality Organization (SASO) has adopted a policy of basing all national standards for electrical products exclusively on IEC standards. This policy was put in place despite the fact that Saudi Arabia has a sizable residential, commercial, and industrial infrastructure that utilizes products and systems in line with U.S.-developed international standards. Many Saudi companies continue to issue product specifications utilizing U.S. standards and depend on genuine replacement parts and products that meet those very standards, meaning that this new policy hinders the ability of companies to import the U.S. electrical products and spare parts they need.

The NAM has concerns with the proliferation of standards and technical regulations that serve as effective barriers to trade or limit market opportunities for manufacturers in the United States. In some cases, the proliferation of these standards stems from activities undertaken by IGOs designed to influence national regulators to adopt a particular policy agenda. While these activities oftentimes start broadly through means such as international conferences and political declarations, the end result is frequently model legislation or technical regulations developed without broad stakeholder input or evidence that are then pushed to the national level. For example, the World Health Organization’s (WHO) World Health Assembly in May 2016 passed a controversial resolution<sup>19</sup> urging member states to adopt WHO technical guidance to prohibit the marketing of complementary food products for infants and young children.<sup>20</sup> The WHO technical guidance seeks to deny consumers and health care professionals access to information about milk products designed to meet the specific nutritional needs of young children. NAM members have already seen related draft regulations in markets such as **Hong Kong, Malaysia, Indonesia** and **Thailand** that appear to target imported products coming from the United States and other countries.

In other cases, the proliferation of problematic standards stem from proactive efforts by individual countries or regional organizations to promote their own standards at the exclusion of U.S. or international standards. For example, U.S. automotive safety and environmental standards are being eclipsed in third markets thanks to concerted efforts by other groups, notably the **European Union**, to promote their own standards in lieu of U.S. standards. For example, motor vehicle manufacturers in the United States have seen a significant move toward the adoption of European-based vehicle standards (UN-ECE) and away from U.S.-based standards (FMVSS), encouraged through Europe-funded advocacy and capacity-building

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<sup>19</sup> World Health Assembly, [“Resolution on ending inappropriate promotion of foods for infants and young children,”](#) (WHA69.9), May 28, 2016.

<sup>20</sup> World Health Assembly, [“Guidance on ending the inappropriate promotion of foods for infants and young children,”](#) (A69/7 Add.1), May 13, 2016.

programs. **Ecuador**'s 2014 announcement that it would no longer accept FMVSS on 12 safety-related standards was a jarring example, representing a departure from the status quo in which Ecuador accepted both FMVSS (U.S. Environmental Protection Administration) and United Nations Economic Commission for Europe (UNECE) certifications for motor vehicles. After significant advocacy from the U.S., Ecuador announced that it would postpone implementation of the regulation in August 2015, but only until October 2016. Similar advocacy to protect continued recognition of U.S.-based standards have also occurred in recent years in **Egypt, Morocco, Colombia, and Peru.**

The NAM is closely monitoring the **European Union**'s efforts to expand existing regulatory regimes related to chemicals, including its Restrictions on the Use of Hazardous Substances (RoHS) regime and the scope of chemicals included in the EU's Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) to include new areas such as phthalates and nanomaterials. The NAM and its members remain concerned that these measures may reflect an approach to regulating and managing chemical risk that differs from those in the United States, such as approaches incorporated into the recent Lautenberg Chemical Safety Act. As the NAM has indicated in comments on these measures, broad implementation of such measures not only impacts manufacturers of those substances, but also a wide range of products that incorporate those substances into other products – meaning that these technical regulations may inadvertently impede the ability to sell or deliver key types of equipment that serve important public purposes. As noted above, regulatory approaches should seek input from all stakeholders and be narrowly tailored to address their objectives. As well, when major changes are made, sufficient transition times should be included especially where new product innovation will be required. In addition to the expansion of these chemical regulations in Europe, other countries are also drafting or considering chemical regulations that either appear to largely incorporate elements of RoHS and REACH (such as **China, Laos, Ukraine, and the United Arab Emirates**) or are considering varying models for chemical regulation (such as **Brazil**).

In **Korea**, market access for passenger vehicle and motorcycle manufacturers has been substantially impeded by a lack of transparency and predictability, and insufficient adherence to good regulatory practice such as periodic reviews of existing regulations and standards. The result has been a steady stream of proposed new and modified regulations that do not align with international norms and serve as non-tariff barriers to imports of these products made in the United States. Although the KORUS FTA was supposed to resolve many of the existing market access problems facing imported vehicles, companies still face a range of longstanding barriers, as well as new measures, that have had an adverse impact on imports. In the automotive sector, these mostly technical barriers vary widely, including new damage disclosure requirements on motor vehicle manufacturers, new fuel economy compliance test requirements that must be in place by the end of 2016 without a fully defined tolerance level, and new greenhouse gas innovation credit scheme that required significant US government and industry intervention to bring it in line with global norms but still does not include a mid-term review, and rushed plans to adopt a unique Korean Real Driving Emissions (RDE) requirement for passenger vehicles before the global standard is completed. Other unnecessary non-tariff barriers include marking requirements for a growing number of auto parts, unique regulatory requirements related to recalls and defects, rules for specific auto parts such as panoramic sunroofs, and outdated requirements for seat size and vehicle ground clearance. In addition, Korea maintains noise standards for motorcycles that limit the use of large motorcycles on Korean highways. These and other barriers must be addressed urgently to ensure meaningful access to the Korean market for automobiles and motorcycles, and that the KORUS FTA delivers fully on its promise for manufacturers in the United States.

**China's** State Council Legislative Affairs Office (SCLAO) in March 2016 released the Standardization Law for public comments, with significant potential changes to China's standardization system. Key areas included in these changes include the role of association standards, whether foreign technical experts will be allowed to draft and participate in standards-setting, treatment of confidential business information, and how proposed mechanisms for addressing standards-related conflicts may be resolved. The NAM and its members remain concerned about various provisions in the law – including the lack of reference to China's commitments to its WTO TBT obligations and stated self-declaration requirements for enterprise standards that could endanger IP rights.

As part of a broader import substitution policy, **Ecuador's** Foreign Trade Committee (COMEX) announced Resolution 116 in December 2013, a document requiring U.S. exporters for some 300 products to obtain Certificates of Recognition through a conformity assessment process that could only be conducted by bodies approved by the Ecuadorian Accreditation Organization. Those rules were never notified to the WTO, and were almost immediately a topic of major concern for the U.S. and other governments. Although EU officials have negotiated an exemption to the rule for products of EU origin, and although COMEX issued a series of resolutions in 2014 removing some of the initial products from the scope of the resolution, significant concerns remain about this resolution and its impact on manufacturers in the United States seeking to export to Ecuador.

**India** has taken steps to address previous concerns related to previous certification challenges with food products, but has raised new questions about technical regulations in medical devices. In food products, the Food Safety Standard Authority of India (FSSAI) has been working with U.S. and other stakeholders to address and improve its food approval process, after the earlier process was ruled unconstitutional by the Indian Supreme Court. The NAM encourages the U.S. government to continue to monitor FSSAI's efforts closely to ensure full compliance. On medical devices, the NAM and its members are concerned with new policies and regulations that continue to apply an outdated, one-size-fits-all regulatory approach to both pharmaceuticals and medical device products, such as the lack of progress on revising the Drug and Cosmetics Act, delays in introducing separate new regulations for medical devices, and the addition of cardiac stents to India's essential drug list.

**Canada** also maintains strict rules to define hazardous waste that crosses its borders that disrupt trade in the chemical industry with the United States. Unlike Canadian provincial rules or U.S. federal and state regulations, the Canadian federal government does not provide any exemption to allow empty containers with a *de minimis* level of hazardous waste residue to bypass the substantial paperwork requirements that normally accompany transboundary shipments of hazardous waste. Such policies mean that any containers transiting the border for cleaning have to go through onerous and time-consuming transboundary permitting and cradle-to-grave paperwork tracking requirements, impacting not only makers and end users of chemicals and paints, but downstream industries that use those products as well as hazardous waste cleaning facilities.

Many countries require local testing and certification for imported products, as opposed to testing by a laboratory or conformity assessment body certified by an independent international certification body. Such local testing and certification requirements drive up the cost and delay for getting products to market, harming both the growth of those industries as well as choices available to local consumers. These requirements include local testing requirements for information technology equipment in **Brazil** and **India**, local retesting of ICT

hardware after software updates in **Costa Rica** and continued local telecom testing requirements in **Mexico** (due to the stalled implementation of a mutual recognition agreement).

Manufacturers in the United States also face many other instances of unique standards and certification procedures, such as unique standards on motorcycle tires in **Indonesia** that may be designed to protect local industry and unnecessary requirements set by **Saudi Arabia's** SASO requiring burdensome testing for electric motors that by regulation should be exempted.

## 6. Export Policies

The NAM has long supported the elimination of market-distorting export policies, subsidies, and trade practices around the world, as well as the active use of international dispute settlement, bilateral agreements, and the application of trade laws and negotiated remedies to address these issues wherever they arise. The NAM has seen the growth in such policies in a variety of markets, including **Argentina, Brazil, China, India, Indonesia, Malaysia** and **Russia**.

Global overcapacity, largely occurring in **China**, is affecting manufacturers in the United States in a range of industries – including steel, aluminum, metal products, chemicals, fertilizer, concrete, agricultural processing, and semiconductors – as it is actively contributing to a glut in global capacity problems that challenges economies around the world. While China has announced a mix of domestic policies to address overcapacity, more action is needed. The United States is discussing these issues with China and other partners in a variety of other forums, including multilateral channels like the OECD and G20 and bilateral dialogues like the Joint Commission on Commerce and Trade (JCCT), but should ensure consistent messaging through WTO channels as well – seeking tangible, sustained efforts to curb overcapacity as well as additional concrete commitments to expand its efforts to address overcapacity effectively and mitigate its impact on the global economy.

The United States has successfully used WTO channels in the past to push back on export restraints and subsidies from China, winning a 2013 case against Chinese export quotas and duties for raw materials such as bauxite, manganese, and zinc, as well as a 2014 case against Chinese export restraints used on rare earths metals. Earlier this year, the United States scored a major victory on one set of subsidies in April 2016 when China – under pressure from a U.S.-filed WTO case filed against more than 175 Chinese government measures that provided subsidies to Chinese companies – agreed to dismantle those programs. In their agreement with the United States, China committed to eliminate all aspects of its “Demonstration Bases–Common Service Platform” program, which had provided a series of export subsidies to support Chinese industry clusters through arrangements involving the central government, provincial governments and service providers (known as common service platform providers (CSPs)). Though the agreement represented a major step forward, implementation and further monitoring, however, will be critical to ensure that China meets its commitments and does not establish other export subsidy programs that violate WTO rules.

**India's** April 2015 Foreign Trade Policy (FTP) 2015-2020, designed to boost India's share in world exports, consolidated most of India's existing export subsidies and other incentives into two main export incentive schemes – the Manufactured Goods Exports Incentive Scheme (MEIS) and the Service Exports Incentive Scheme (SEIS). In September 2016, India's Directorate-General of Foreign Trade issued a notice to expand MEIS by more than 2,900 products, allowing companies exporting these products to receive sales-based credits that can be used to offset import duties, excise taxes, or service taxes. The same notice also increased

the incentive rates on an additional 575 products. Products affected by the notice include a range of manufacturing industries, including metal products, household appliances, chemicals and dyes, medicinal products and components, textiles and garments, consumer products, and food and agriculture products.

To give their own domestic industries an unfair commercial advantage, **Indonesia**, **India**, **Russia** and other countries have imposed damaging bans, quantitative restrictions and/or taxes on certain minerals and ores. For example, **Indonesia** implemented an export ban on more than 200 types of unprocessed mineral ores in January 2014, and began a two-year phase-out of exports of eight types of mineral ore concentrates. **India** maintains trade distorting export taxes on a variety of iron ore products. It has increased those taxes in recent years, harming manufacturers in the United States. Similarly, **Russia** maintains export duties on a wide range of products, including scrap metals, hydrocarbons and agricultural products.

Other countries, including **Argentina**, **Brazil**, **Indonesia** and **Malaysia**, charge differential export taxes on value-added agricultural products and other goods. These taxes can act as an export subsidy for value-added products and create competitive advantages for local downstream processors of the taxed product, limiting U.S. exports and sales.

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The NAM welcomes this opportunity to comment on the many barriers to U.S. trade and investment globally and looks forward to working with the Trade Policy Staff Committee agencies to address concretely these and other trade barriers in overseas markets that undermine U.S. manufacturing.

Sincerely,



Linda Dempsey

#### **Attachments**

- Appendix 1: Index of Countries Mentioned in NAM Submission to National Trade Estimate

## Appendix 1: Index of Countries in NAM Submission to National Trade Estimate

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